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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1901. 1902.

No. 119.

THE DIAMOND GLUE COMPANY, PLAINTIFF IN ERROR,

vs.

THE UNITED STATES GLUE COMPANY.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF WISCONSIN.

FILED JUNE 14, 1901.

(16,202.)

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1901.

No. 349.

THE DIAMOND GLUE COMPANY, PLAINTIFF IN ERROR,

vs.

THE UNITED STATES GLUE COMPANY.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF WISCONSIN.

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1 UNITED STATES OF AMERICA, } ss:
Eastern District of Wisconsin, }

Circuit Court of the United States for the Eastern District of Wisconsin.

At a stated term of the circuit court of the United States for the eastern district of Wisconsin, begun and held according to law, at the city of Milwaukee, on the first Monday (being the seventh day) of January, A. D. 1901—present, the Honorable William H. Seaman, district judge, presiding—among other the following proceedings were had, to wit:

DIAMOND GLUE COMPANY }
vs. } At Law.
UNITED STATES GLUE COMPANY. }

Be it remembered that heretofore, to wit, on the fifth day of February, A. D. 1900, came the above-named plaintiff, by its attorneys, Messrs. Miller, Noyes, Miller & Wahl, and filed its præcipe for a summons against the above-named defendant, together with its complaint, to be served, and bond for costs approved by the clerk; which præcipe for a summons is as follows:

Circuit Court of the United States for the Eastern District of Wisconsin.

DIAMOND GLUE COMPANY, Plaintiff, }
vs.
UNITED STATES GLUE COMPANY, Defendant. }

Issue a summons in the above-entitled cause. Complaint to be served.

(Signed) MILLER, NOYES, MILLER & WAHL,
Plaintiff's Attorneys.

To Edward Kurtz, clerk.

2 Whereupon a summons issued according to law, with said complaint annexed, as follows:

Circuit Court of the United States for the Eastern District of Wisconsin.

DIAMOND GLUE COMPANY, Plaintiff, }
vs.
UNITED STATES GLUE COMPANY, Defendant. }

[L. S.] The President of the United States of America to the said defendant:

You are hereby summoned to appear within twenty days after service of this summons, exclusive of the day of service, and defend the above-entitled action in the court aforesaid; and in case of your

failure so to do, judgment will be rendered against you according to the demand of the complaint, of which a copy is herewith served upon you.

The marshal of said district is hereby commanded to serve this summons and make due return thereto.

Witness the Hon. Melville W. Fuller, Chief Justice of the Supreme Court of the United States, at the city of Milwaukee, in the eastern district of Wisconsin, this 5th day of February, in the year of our Lord one thousand nine hundred, and of the Independence of the United States the 124th.

EDWARD KURTZ, *Clerk.*

MILLER, NOYES, MILLER & WAHL,
Plaintiff's Attorneys.

P. O. address: Milwaukee, Wis.

3 *Complaint.*

United States Circuit Court, Eastern District of Wisconsin.

DIAMOND GLUE COMPANY, Plaintiff,
vs.
UNITED STATES GLUE COMPANY, Defendant.

The above-named plaintiff for its complaint herein alleges that at the several times hereinafter mentioned it was and now is a corporation duly created, organized, and existing under and by virtue of the laws of the State of Illinois, having its principal office in the city of Chicago, State of Illinois, and that it was at said times and now is a citizen of the said State of Illinois.

That at the several times hereinafter mentioned the said defendant, United States Glue Company, was and now is a corporation duly created, organized, and existing under and by virtue of the laws of the State of Wisconsin, having its principal office in the city of Milwaukee, in the eastern district of Wisconsin, and that at said times it was and now is a citizen of said State of Wisconsin, located and doing business in said eastern district of said State.

Said plaintiff further alleges that on and prior to the 25th day of June, A. D. 1898, it was engaged in the business of manufacturing, buying, selling, or otherwise disposing of and dealing in glue of different kinds and of by-products from tanneries and other establishments, and that it had factories located at various points in the States of Illinois, Indiana, Missouri, and elsewhere with branches established for carrying on its business in New York, Boston, Philadelphia, Toronto, Canada, and other places, and was and had
4 been extensively engaged in the manufacture of glue and other products and in the sale of the same from its own factories, establishments, and warehouses and from the factories and establishments owned by others located in various parts of the United States; all of which facts were well known to said defendant, its officers, agents, and stockholders.

Said plaintiff further alleges that prior to said 25th day of June, 1898, it had had large experience in the construction and operation of factories for the manufacture of glue and in the supervision and management of the same, and that its officers then possessed knowledge and experience in the construction and management of such factories and in the sale and disposition of their products and of all the raw material which is sold to or used by companies engaged in the manufacture or sale of glue or any of its bi-products, and that it possessed large facilities for selling and disposing of the same; all of which was at said time well known to said defendant, its officers, agents, and stockholders.

Said plaintiff further alleges that at some date prior to the 25th day of June, 1898, the said defendant was organized as a corporation for the purpose of purchasing or otherwise acquiring from the various tanneries located in the city and county of Milwaukee, Wisconsin, all the raw material and glue stock turned out by said tanneries at the market price, to be determined at a fixed time or times during each year, and to convert such glue stock, materials, and bi-products of said tanneries into glue at a factory to be located and erected upon some site in the vicinity of the city of Milwaukee, Wisconsin; and this plaintiff alleges upon information and belief that
5 in accordance with said arrangement contracts were then or subsequently entered into by and between said United States Glue Company when organized and all or nearly all of the companies engaged in the tannery business which were located in or near the city of Milwaukee, Wisconsin, whereby the said defendant should take and pay for all such glue stock and raw material turned out and subject to be disposed of by said tanneries at a fair market price, to be determined at the first of or at some other time during each year for a period of at least five years from the date of the construction of said factory by said defendant; that the sole or principal object of the organization of said defendant was for the purpose of enabling such companies operating tanneries in the city of Milwaukee to dispose of their glue stock of various kinds to a corporation controlled by themselves and to forestall any unnatural decline in the prices of such glue stock; that all or substantially all the capital stock of said defendant is held and owned by said tanneries or by the stockholders in the companies owning and operating the same.

Said plaintiff further alleges that on or about the 25th day of June, 1898, an agreement was entered into by and between said plaintiff and said defendant, wherein and whereby, in consideration of the mutual agreement of the parties, the said defendant agreed to erect, equip, and complete a glue factory on a site to be thereafter selected by it within sixty days from said 25th day of June, 1898, which said factory should be begun and completed by it with the least possible delay after such site should have been selected; said plaintiff agreed to advise and plan with the architect of said defendant, and to oversee and supervise the plans of said factory, and secure such economy of space and processes as might be gained from
6 the practical experience which said plaintiff had had in the operating of glue factories, and said plaintiff further agreed

to give said defendant the benefit of all of its labor-saving devices and the benefit of its knowledge and experience which it had used or acquired in the manufacture of glue. It was further agreed between the said parties that said plaintiff should have the management of the manufacturing in said factory when completed, and should operate the same for said defendant, and should furnish a superintendent for such factory, whose salary should not exceed one hundred and fifty dollars per month, and that said plaintiff, by its officers, should give said factory such personal supervision as might be necessary from time to time in the operation of the same, and that said officers should give said defendant, in the management and operation of said factory, the benefit at all times during the life of such contract of its experience and knowledge and of the experience and knowledge of its officers; that said plaintiff should keep said factory supplied with a capable superintendent at all times during the life of said contract, whose salary should not exceed the amount hereinbefore mentioned; that said plaintiff should control, handle, and sell the entire output, including glue and bi-products of said factory, and all such products should be billed and sold as the product of the defendant, but the invoices should be stamped "Diamond Glue Company, exclusive sale agents." It was further agreed between the parties hereto that beginning as soon as said factory should be in operation the said plaintiff should refrain from manufacturing either hide or calf glue at any of its said factories, and should guarantee the payment of all accounts for sales made by or through it. It was further agreed that said plaintiff should receive a
7 commission of ten per cent. of the amount of all sales of glue or bi-products, and that thereupon ten per cent. of the cost of the plant should be charged off each year for depreciation, and of the net profits remaining ten per cent. of the amount of the then capital stock should be set aside for its stockholders, and thereupon said plaintiff should receive ten per cent. of the excess of net profit over and above the said ten per cent. dividend so set aside for the stockholders of said defendant. It was further understood and agreed between said parties by said contract that the raw material sold to the said defendant by or for its stockholders should be sold to and purchased by said defendant at the fair market price for the respective grades thereof. It was further understood and agreed that said contract should cover and extend over a period of five years from the completion and the commencement of the operation of the plant so to be located and built by the defendant.

Said plaintiff further alleges that after the execution of said agreement, which was in writing and signed by the parties hereto, the said defendant selected a site for its said glue factory near the city of Milwaukee, in the county of Milwaukee and State of Wisconsin, and thereupon proceeded to erect and equip and complete said glue factory, and said plaintiff did advise and plan with the architect of said defendant and did oversee and supervise the plans of said factory so as to secure such economy of space and processes as it was able to do from its practical experience in the operation of other glue factories, and did from time to time and as required give

to said defendant the benefit of all its labor-saving devices, as well as of the knowledge and experience it had used or acquired in
8 the manufacture of glue.

Said plaintiff further alleges that the said plant was so located and constructed and was put into operation on or about the 25th day of July, A. D. 1899; that as soon as said factory was in operation said plaintiff did then refrain and has at all times since refrained from manufacturing either hide or calf glue at any of its factories, and did thereupon close down its factories before that time used for the manufacture of hide and calf glue, and has not operated the same since said date, and on account of said agreement did at great expense fit one of them for the manufacture of other kinds of glue and leased them to other parties. Said plaintiff has at all times been ready and willing to perform the terms and conditions of said contract and has in all respects fully complied with the terms and conditions of the same to be performed on its part.

Said plaintiff further alleges that upon the completion of said plant it took the management of the manufacturing therein and operated the same for said defendant and furnished a capable superintendent therefor, whose salary did not exceed one hundred and fifty dollars per month, to be paid by said defendant, and did, by its officers, give said factory such personal supervision as was necessary from time to time in the operation of the same, and by its officers did give to said defendant in the management and operation of said factory the benefit at all times during the operation of said factory by it and until the breach of the contract hereinafter mentioned of the experience and knowledge possessed by said plaintiff and by its officers in respect to the management and operation of the same.

9 Said plaintiff further alleges that upon the commencement of the operation of said factory and the manufacture of glue therein said plaintiff handled and sold all the output thereof which it was able to dispose of, including the glue and the by-products of said factory, until the breach of the contract hereinafter mentioned, and that all such products were billed and sold as the product of said defendant, but the invoices for the same were stamped "Diamond Glue Company, exclusive sale agents," as provided in said contract.

Said plaintiff further alleges that said defendant was unwilling in many cases to accept the prices obtained or offered by plaintiff for sales of lots of glue and by-products manufactured by the defendant, but, on the contrary, asserted the right to reject contracts of sale and sales made by the plaintiff in case the officers of defendant did not think the price obtained by the plaintiff adequate, and in many instances did actually refuse and fail to carry out sales and contracts of sale of glue and by-products made by plaintiff on behalf of defendant, giving as a reason therefor that the price obtained by plaintiff was not satisfactory.

Said plaintiff further alleges that it continued the operation of said plant and duly performed all the terms and conditions of said contract which it had agreed to perform until on or about the

2nd day of December, 1899, the said defendant refused to perform the terms and conditions of said contract to be performed on its part, and refused to permit said plaintiff to have the management and control of said factory and the operation thereof, and refused to permit said plaintiff to make any further sales of the output and by-products of said factory, and notified said plaintiff that the said agreement made between them was terminated and at an
10 end, and that it would not longer recognize the said agreement as existing, and thereupon refused to perform the same.

Said plaintiff alleges that there is now due and owing to it from said defendant the sum of sixteen hundred ninety-eight and $\frac{48}{100}$ dollars ($1,698.48) for and on account of commissions on sales made by said plaintiff for said defendant under and pursuant to the terms of said contract.

Said plaintiff further alleges that the services furnished by it in planning, overseeing, and supervising the construction of said factory for said defendant and in giving to said defendant the benefit of its labor-saving devices and the knowledge and experience which it had in the manufacture of glue and in the management of the manufacture and of the operation of said factory were of great value to said defendant, and which said services have not been paid for by said defendant.

Said plaintiff further alleges that it sustained great loss and damage in closing down its factories for the manufacture of hide and calf glue, in refitting the same as hereinbefore stated, in withdrawing from the glue stock market for said factories, in procuring customers for said defendant, and in refraining from manufacturing either hide or calf glue at its factories, no part of which loss and damage has been paid by said defendant.

Said plaintiff further alleges that the output of said factory so constructed and put into operation by said defendant, including its glue and bi-products, would amount to at least three million pounds of glue per year, and that the grease supplied from said factory to be sold by said plaintiff under the contract if carried out would amount to at least one and one-half million pounds per
11 year, and said plaintiff has been and will be deprived of its commissions on sales and of its profits under said contract by reason of the defendant's breach thereof.

That by reason of the premises and of the violation of said contract on the part of said defendant the said plaintiff has sustained damages in the sum of two hundred thousand dollars ($200,000).

Wherefore said plaintiff demands judgment against said defendant for the sum of two hundred thousand dollars ($200,000), with interest, besides the costs of this action.

BANCROFT & ADAMS,
MILLER, NOYES, MILLER & WAHL,
Plaintiff's Attorneys.

GEO. H. NOYES, *Of Counsel.*

STATE OF ILLINOIS, } ss:
County of Cook, }

J. R. Morron, being duly sworn, says that he is the vice-president of the above-named plaintiff, and makes this verification on its behalf; that he has read the foregoing complaint and verily believes the same to be true; that the reason why this verification is not made by plaintiff is because it is a corporation, and that none of its principal officers reside in the State of Wisconsin; that the grounds of deponent's belief on the subject are based on the contract referred to in said plaintiff's complaint and on other papers which are in the possession of deponent and from his knowledge of the transactions and from information received by him in his relations to and dealings with the parties as vice-president of said plaintiff.

(Signed) J. R. MORRON.

Subscribed and sworn to before me this 3rd day of Feb., 1900.

HARRY L. FEARING,

[L. S.] *Notary Public, Cook County, Illinois.*

12 Summons and complaint returned:

"Served on the within-named U. S. Glue Company by showing Fred Vogal, Jr., president of said company, this summons and complaint and delivering to him, personally, a copy thereof this 8th day of February, A. D. 1900.

THOMAS B. REID, *Marshal,*
By W. N. DURBIN, *Deputy.*"

Fees, $2.36.

FEBRUARY 23, 1900.

This day came the defendant, by its attorneys, Messrs. Quarles, Spence & Quarles, and filed its answer as follows:

Answer.

United States Circuit Court, Eastern District of Wisconsin.

DIAMOND GLUE COMPANY, Plaintiff, }
vs.
UNITED STATES GLUE COMPANY, Defendant. }

Now comes the above-named defendant, United States Glue Company, by Quarles, Spence & Quarles, its attorneys, and for answer to the complaint of the plaintiff herein—

Admits that said plaintiff is and at all the times mentioned in the complaint herein was a corporation, created, organized, and existing under and by virtue of the laws of the State of Illinois, having its principal office in the city of Chicago, in said State, and that it was and is a citizen of said State of Illinois; that this defendant is and at all times mentioned in said complaint was a corporation duly created, organized, and existing under and by virtue of the laws of the State of Wisconsin, having its principal office in the city of

Milwaukee, Wisconsin, and that it was and is a citizen of said State of Wisconsin, located and doing business in the eastern district thereof.

13 This defendant alleges on information and belief that the said plaintiff was organized and incorporated for the purpose of manufacturing glue and by-products, and that it had or operated glue factories located in the city of Chicago, in the State of Illinois, and in the city of Madison, in the State of Indiana, but this defendant denies on information and belief that the said plaintiff is or ever was authorized or empowered, by its charter or otherwise, to do any business other than manufacturing and disposing of the products of its own manufacture; and on information and belief denies that it was ever empowered or authorized, by its charter or otherwise, to superintend or agree to superintend the construction of any factory or factories other than its own or to act as broker, factor, or sales agent for any other person, persons, or corporation or to do or agree to do any other business than such manufacture and the disposal of its own products; and this defendant denies on information and belief that the said plaintiff ever had power or authority to make or carry out the contract set out in the said complaint, and alleges on information and belief that the said contract was *ultra vires* on the part of the said plaintiff and void.

And this defendant alleges that its factory was and is located within the State of Wisconsin and its business is and was at all times transacted in the said State; that prior to the first day of September, 1898, this defendant had transacted no business with others than its own members, except partially planning and making certain contracts for the construction of its said factory and acquiring a site therefor, and that practically all things which were done or attempted to be done by the said plaintiff under the contract

14 set out in the complaint were done by it after the 1st day of September, A. D. 1898.

And this defendant alleges that said plaintiff has never filed or caused to be filed in the office of the secretary of state of the State of Wisconsin any copy of its charter, articles of association or incorporation, or in any way complied with the statutes of the State of Wisconsin in regard to foreign corporations, or in any way complied with or performed any of the provisions of section 1770*b* of the Revised Statutes of the State of Wisconsin for the year 1898; that by said section of the said statutes it was and is made a penal offense for any corporation incorporated or organized otherwise than under the laws of the State of Wisconsin to transact any business or acquire, hold, or dispose of any property in the State of Wisconsin until such corporation shall have caused to be filed in the office of the secretary of state of said State a duly authenticated copy of its charter or articles of association or incorporation; that each and every act of the said plaintiff under the said alleged contract, after the 1st day of September, A. D. 1898, was done by it in violation of the laws of the State of Wisconsin, and that the said contract was and is wholly void as to and on behalf of said plaintiff, and that it has and can have no cause of action arising therefrom, for that each

and every act of the said plaintiff, under and in pursuance of the said contract, was transacting business or acquiring, holding, or disposing of or attempting to acquire, hold, or dispose of property in the State of Wisconsin contrary to the laws thereof.

This defendant admits that on and prior to the 25th of June, 1898, said plaintiff was engaged in the business of manufacturing, selling, and dealing in glue of different kinds and of its by-products,
15 and that it had factories located at various points, but as to what points other than the cities of Chicago and Madison this defendant has no knowledge or information sufficient to form a belief.

This defendant admits that said plaintiff represented, as an inducement to this defendant to enter into the said contract, that said plaintiff was well equipped with branches for carrying on its business at various places, and that it was and had been extensively engaged in the manufacture of glue and other products and in the sale of the same from its own factories, establishments, and warehouses; and this defendant alleges that in order to induce this defendant to enter into said contract said plaintiff represented that on account of its experience and the experience of its officers and employés it could and would design for this defendant a factory and the equipments thereof, by means of which good and merchantable glue could be manufactured at a maximum cost of two and one-half cents per pound, and that said plaintiff then so represented and led this defendant to believe that its said representations were based upon its, said plaintiff's, wide experience and peculiar knowledge of the process and cost of the manufacture of glue derived by it from its own operations at its own factories; that said plaintiff at said times, as such inducement to enter into the said contrret, represented to this defendant that it, said plaintiff, and its officers had great and peculiar knowledge, experience, and skill not possessed by this defendant in and about the said matters, and represented and induced this defendant to believe that the designs, plans, appliances, and equipments which the said plaintiff would devise for the said factory would have a capacity for the production of glue and would produce glue at a maximum cost of manufacture of two and one-half
16 cents per pound, and further represented, as such inducement, that the experience and knowledge and skill of the said plaintiff and its officers were such that said plaintiff could readily place the output of the said factories upon the market and sell the same on the most advantageous terms and at prices higher than would be procured without their intervention.

And this defendant admits and alleges that prior to said 25th day of June, 1898, said plaintiff had and as an inducement to this defendant to enter into the said contract represented that it had had large experience in the construction and operation of factories for the manufacture of glue and in the supervision and management of the same, and so represented that its officers then possessed knowledge and experience in the construction and management of such factories and in the sale and disposing of their products and of all the raw material which is sold to or used by companies engaged in

the manufacture or sale of glue or any of its by-products, and that it possessed large facilities for selling and disposing of the same; and this defendant alleges that by reason of its belief of and reliance upon said representations it was induced to enter into and did enter into the said contract.

This defendant admits that in the month of June, 1898, it was organized as a corporation for the purpose of erecting a glue factory in the county of Milwaukee, Wisconsin, and thereby utilizing the raw material and glue stock turned out by the tanneries which were interested or to become interested in this defendant and for the purpose of manufacturing into glue and its by-products the said raw material and glue stock for the benefit of the owners of the said tanneries who should become stockholders in this defendant,
17 and that in accordance with such arrangement contracts were entered into with certain of said tanneries for one year and no longer, and with one of said tanneries for a period of ten years, by which arrangements the glue stock and raw material turned out by said tanneries were to be taken by this defendant at a fair market price to be determined at stated times.

This defendant alleges that the principal object of the organization of this defendant was to enable the owners of the various tanneries interested therein to manufacture into glue and its by-products their own glue stock and thereby acquire to themselves the profit of said manufacture, if any there should be.

This defendant admits that substantially all its capital stock is held or owned by tanneries in the State of Wisconsin or by the stockholders in the companies owning and operating the same.

This defendant admits and alleges that on or about the 25th day of June, 1898, a written agreement was drawn by the said plaintiff and tendered to this defendant with a request from said plaintiff that it be immediately executed, and that without submitting or having an opportunity to submit the same to its counsel this defendant executed the same, and that the said contract was entirely drawn by said plaintiff or by counsel learned in the law engaged by it for that purpose, and that the said contract is in the words and figures following, to wit:

This agreement entered into this twenty-fifth day of June, 1898, by and between the United States Glue Company, a corporation organized under the laws of Wisconsin, and having its home office in the city of Milwaukee, State of Wisconsin, party of the first part, and Diamond Glue Company, a corporation organized under
18 the laws of Illinois, and having its home office in the city of Chicago, State of Illinois, party of the second part, witnesseth:

For and in consideration of the agreements hereinafter contained, the party of the first part agrees to erect, equip and complete a glue factory on the site to be selected hereafter by party of the first part.

Party of the second part agrees to advise with, and plan with the architect of party of the first part, and to oversee and supervise the plans of said factory, and to secure such economy of space and processes as may be gained from the practical experience the party of the second part has had in the operating of three glue factories;

and party of the second part further agrees to give party of the first part the benefit of all its labor-saving devices, and the benefit of its knowledge and experience used or acquired by it in the manufacture of glue.

It is agreed that the site shall be selected by party of the first part within sixty days from the signing of this contract, and that the factory shall be begun and completed with the least possible delay after the site is selected.

It is further agreed that party of the second part shall have the management of the manufacturing in said factory, and shall operate the same for party of the first part and furnish a superintendent whose salary shall not exceed $150.00 per month to party of the first part, and that party of the second part, by its officers, shall give said factory such personal supervision as may be necessary from time to time in the operation of the same, and said officers will give party of the first part, in the management and operation of said
19 factory, the benefit, at all times during the life of this contract, of the experience and knowledge of said officers and their company.

Party of the second part agrees to keep said factory supplied with a capable superintendent at all times during the life of this contract, whose salary shall not exceed the amount hereinbefore stated.

It is further agreed that party of the second part shall control, handle and sell the entire output, including glue and by-products, of said factory, and all such products shall be billed and sold as the product of the United States Glue Company, but it is agreed that all invoices shall be stamped, "Diamond Glue Company, exclusive sale agents."

During the life of this agreement, beginning as soon as said factory is in operation, party of the second part is to refrain from manufacturing either hide or calf glue at any of their factories.

Party of the second part guarantees the payment of all accounts for sales made by or through it.

It is further agreed that party of the second part shall receive a commission of ten per cent. on all sales of glue or by-products; thereupon ten per cent. of the cost of the plant shall be charged off each year for depreciation; of the net profits remaining, ten per cent. upon the present capital stock shall be set aside for the stockholders; thereupon party of the second part shall receive ten per cent. of the excess of net profits over and above the ten per cent. dividend.

It is understood and agreed that the raw material sold to the United States Glue Company by or for its stockholders, is to
20 be sold to and purchased by said glue company at the fair market price for the respective grades.

This contract is to cover a period of five (5) years from the completion and commencement of the operation of the plant.

(Signed) UNITED STATES GLUE COMPANY,
By FRED VOGEL, JR., *President.*
C. ANSTEDT, JR., *Secretary.*
DIAMOND GLUE COMPANY.
J. R. MORRON, *Vice-President.*

6, 27, '98.

United States Glue Co., Milwaukee, Wis.

GENTLEMEN: Confirming our verbal understanding of the amendment to the agreement signed by the Diamond Glue Company and the United States Glue Company on the 25th inst., we herewith make it a part of agreement above mentioned. In addition to the ten per cent. excess profits that the Diamond Glue Company is to have, it is further agreed and understood that on all excess over and above $25,000 the Diamond Glue Company shall have twenty per cent. of the same.

Kindly confirm this by letter, so that we may attach it to the contract.

Yours very truly,

DIAMOND GLUE CO.
J. R. MORRON, *Manager.*

This defendant admits and alleges that after the execution of the said agreement this defendant selected a site for its said glue factory in the county of Milwaukee, Wisconsin, and thereupon, after the 1st day of September, 1898, proceeded, in all things under the advice and supervision of the said plaintiff, to erect, equip, and complete the said glue factory; that said plaintiff did advise and plan
21 with the architect of this defendant and did oversee and supervise and in all respects control the plans of said factory, and that said plaintiff in all things planned and dictated and controlled the planning, building, and equipment of the said factory; that said plant was put into operation on or about the 26th day of July, A. D. 1899, and said plaintiff thenceforward took the management of and managed the manufacturing in said plant, and operated said plant for this defendant, and furnished superintendents therefor, to be paid and which were paid by this defendant, and did supervise and control the operation of the said factory.

That said plaintiff never has been able to make the said factory produce glue and never has produced glue therein at a manufacturing cost of less than three and one-half cents per pound, and that the failure of said plaintiff to fulfill its representations hereinbefore set out in regard to the cost of the manufacture of such glue proceeded either from the fact that its said representations in that regard were false and untrue and at all times known by it to be false and untrue, or from negligence of said plaintiff resulting in defects in the planning and equipment of the said factory by said plaintiff, and from the circumstance that the superintendent of said factory furnished by said plaintiff to said defendant was, as was the fact, incapable and had not capacity or ability sufficient to manage the said business, or, as this defendant is informed and believes, from all of the said reasons concurring.

And this defendant alleges that the said plaintiff breached the said contract and failed in the performance of the duty imposed upon it by said contract in many respects, and particularly in these:

22 That said plaintiff improperly and insufficiently designed, planned, and equipped the said factory and conducted the

construction and management of the same, so that much of the glue stock of this defendant was wasted and greatly impaired in value, and so that much of the glue manufactured at said factory was of inferior quality and worth much less than it would have been if it had been properly manufactured, and that by reason of the said defaults of the said plaintiff this defendant has been obliged to enlarge and change, and has enlarged and changed, and is still enlarging and changing the plan and equipment of the said factory, and has lost great sums of money by reason of such improper manufacture, all to its great loss and damage.

And this defendant alleges that up to the 1st day of December, A. D. 1899, the said plaintiff, unmindful of the obligation which it had assumed to sell the entire output of the said factory, failed, neglected, and refused to sell said output or to sell more than nineteen per cent. thereof, and continually allowed over eighty per cent. of the said output of glue to accumulate in the said factory unsold, until on said 1st day of December, 1899, there had so accumulated and remained in and upon the hands of this defendant at least 589,000 pounds of glue, of the value of upwards of $80,000, and that upon said date and at all times said plaintiff refused and neglected to sell the same or to indicate when the same could or would be sold, and acknowledged that as to the said accumulation and as to an equal proportion of accumulation in the future it was not only powerless to move or sell the same, but was also powerless to give any assurances in regard to the sale of the same; that said plaintiff then claimed that this defendant should, nevertheless, go on
23 manufacturing and accumulating such unsold glue, and said plaintiff then and there denied that any obligation rested upon it to sell any more of the said product than it saw fit; and this defendant alleges on information and belief that said plaintiff at all the said times was engaged in the sale of glue from other factories owned or controlled by it, and sold such output to the neglect of the output of this defendant's factory, and in violation of the obligations imposed upon it by said contract sold first the products of the said other factories and kept the product of defendant's said factory out of the market, and refrained from attempting to sell the same, for the purpose of advancing the prices and facilitating the sale of the said products of said other factories, and that at all said times said plaintiff betrayed and neglected the interests of this defendant, and in these regards subordinated them to adverse interests existing in favor of said plaintiff, and used the said output of this defendant's said factory solely for the purpose of manipulating the market for its, said plaintiff's, own profit and to the great loss and damage to this defendant, and failed and neglected in all respects to perform its duty as sales agent of this defendant.

And this defendant alleges that at all times the said plaintiff so managed the manufacturing at this defendant's said factory and the sale of its products that a constant and enormous loss was imposed and was being imposed and was threatened to be continuously imposed upon this defendant, in that the cost of manufacture was much greater than it would have been had the said factory been properly

equipped and properly managed, and in that the prices procured by said plaintiff for such of said product as it sold were, as
24 this defendant is informed and believes, nearly uniformly under the market price of such product and were below its actual cost; that the said plaintiff in but few instances secured prices for said products which covered the cost thereof; and this defendant alleges that every day that the said plaintiff continued in control of the said factory and its product great money loss was entailed upon this defendant by reason of the fact that said plaintiff sold and was selling and threatened to continue to sell said product at less than the cost of its production.

And this defendant alleges that on or about the 1st day of December, 1899, this defendant informed said plaintiff that by its control of said factory and its output, and its failure to sell the said output, and its manifold breaches of the said contract, it had become and would be impossible for the said defendant to continue the operation of the said factory on account of the great losses that were constantly being made through its said operation, and because under the management of the said plaintiff it appeared and was clear that such losses would be continuous. This defendant therefore stated to the said plaintiff that either the factory must be shut down indefinitely and manufacture therein cease or the management of such factory and the sale of its output must be taken away from the said plaintiff, and that said defendant would no longer continue the operation of the said factory at a great loss for the benefit solely of said plaintiff; that therefore and thereupon this defendant, because of the said conduct of the said plaintiff and its manifold breaches of the said contract, notified the said plaintiff that it would no
25 longer recognize the existence of said contract, and that thereupon this defendant refused and has ever since refused to recognize the said contract or to permit the plaintiff to act thereunder.

This defendant admits that the products of said factory were billed and sold as the product of this defendant, and that the invoices for the same were stamped "Diamond Glue Company, exclusive sale agents," as provided in said contract.

This defendant denies that it ever refused to recognize and consummate any sales made by the said plaintiff, although the fact was that it believes and still believes that many of such sales were made by said plaintiff under the actual market price of the said product at the times that such sales were made. But this defendant alleges that it did refuse to permit the said plaintiff to use its, said defendant's, product to fill contracts made by the said plaintiff on its own account before the date of its said agreement with this defendant at prices much below the market prices obtaining at the time the said plaintiff so attempted to fill such contracts, and that this defendant did refuse to permit said plaintiff to sell this defendant's products to itself—that is, to said plaintiff—and on one occasion refused to sell such product to said plaintiff at prices fixed by said plaintiff.

On information and belief this defendant denies that the said plaintiff closed down its factories or any of them, or caused them or

any of them to cease to operate, or fitted either or any of them for the manufacture of other kinds of glue. On the contrary, this defendant alleges on information and belief that said plaintiff, in violation of the spirit and terms of the said contract so made
26 with this defendant, leased certain of its factories to other parties, and through its tenants continued the manufacture of mixed glue, so called, which is a kind of glue composed of hide glue and bone glue, and that said plaintiff, in violation of the spirit and terms of the said agreement, at all times controlled and sold the output of all of the said factories, and that said plaintiff, while its said said agreement with this defendant was in force, made a contract with the Gaenzlein & Fischer Glue Company, of Gowanda, New York, to take the factory of the said company, which had capacity larger than the aggregate capacity of said two factories of the said plaintiff at Chicago and Madison, and that thenceforward said plaintiff manufactured hide and calf glue at the said Gowanda factory and sold such product in active competition with the product of this defendant, and in such dealings and sales subordinated the interests and rights of this defendant to those of the plaintiff, to the great loss and injury of this defendant and in violation of its, said plaintiff's, duty to this defendant.

This defendant admits that there are unpaid commissions upon sales made by said plaintiff amounting to $1,639.13 and no more, but alleges that such commissions are not yet due or payable.

This defendant on information and belief denies that the said plaintiff sustained any loss or damage whatever in closing down its factories or any of them, or in refitting them or any of them, or in any other way, by reason of anything mentioned in the said contract or any act or refusal to act on the part of this defendant.

This defendant denies that the output of its said factory would, if the said agreements had continued in force, have amounted to any amount of glue or grease whatever, and alleges that the said factory would in that event have produced no glue or grease
27 whatever, and alleges that the said plaintiff has lost nothing whatever by the termination of the said agreement and has been in no way injured or damaged thereby, and that it was informed by said plaintiff and verily believes that all the commission provided for by said agreement on account of sales to be made by said plaintiff would have been consumed in the expenses attending the making of such sales.

This defendant, further answering, denies each and every allegation in said complaint contained not hereinbefore specifically admitted or denied.

And for further answer and by way of counter-claim this defendant alleges—

That this plaintiff, on or about the 25th day of June, A. D. 1898, made, entered into, and executed to and with this defendant the written contract hereinabove set out, to which this defendant begs leave to refer with the same effect as though the said contract were set out again at length in this counter-claim.

That thereupon the said plaintiff entered upon the performance

of the said contract, and planned and supervised and directed in all things the construction and equipment of said factory, which was built by this defendant between said date and the 26th day of July, A. D. 1899, and that said plaintiff and this defendant acted under the said contract until about the 1st day of September, 1899.

I.

And for a first counter-claim and first separate cause of action against said plaintiff this defendant alleges—

That it was contemplated between the said parties that the glue and grease which were to be manufactured in the said factory
28 were to be produced from fleshings and hide trimmings and other similar glue stock to be produced from the tanneries operated by the stockholders of this defendant or tanneries in which such stockholders were interested.

That at all times the said plaintiff had had experience in the manufacture of glue, and held itself out to this defendant as having had wide and peculiar experience and having wide and peculiar knowledge of all of the steps and processes necessary or usually followed in the manufacture of glue and its by-products, and that said plaintiff at all times well knew, as the fact was, that this defendant had not or had any of its stockholders or officers any experience or skill in the matter of the said processes of manufacture; that said plaintiff at all times knew, as the fact was, that before the said fleshings, trimmings, and glue stock could be manufactured into glue certain preliminary treatment of such trimmings, fleshings, and glue stock was necessary, and, among other things, that said substances, in order to be turned into high-grade and valuable glue, must be treated for a considerable time in liming vats and be put through other processes; that at all said times said plaintiff knew of the proposed and contemplated capacity of such factory and of the quantity of such fleshings, trimmings, and glue stock which would be produced continually by the said tanneries, and well knew, as the fact was and is, that at least six hundred liming vats were necessary for such preliminary treatment of such substances in order that the product of glue therefrom might be of high grade and valuable, but that said plaintiff, nevertheless, so negligently, improperly, and unskillfully planned and constructed the said factory that its appliances, and particularly its liming vats, were insufficient in number and capacity to properly prepare and care for the
29 fleshings, trimmings, and glue stock required and so known to it to be required and contemplated to be used and which were actually used in said factory, or to put the same in proper condition to be used in the manufacture of glue and grease, and that said plaintiff actually caused to be constructed in the said factory only three hundred of such vats, which were totally insufficient in capacity for said purposes, and that by reason of such insufficiency it became and throughout the continuance of the said contract was impracticable to utilize such trimmings, fleshings, and glue stock to their full extent, or to produce therefrom the amount of glue and grease which would have been produced therefrom if such

substances had been or could have been treated in proper vats and appliances.

That the waste and loss of production which resulted to this defendant from the said acts and defaults and negligence of the said plaintiff amounted in value to $5,000, as this defendant is informed and believes, and that this defendant has been since said last date compelled to build and is now building at great expense additional appliances and liming vats, all to this defendant's damage $20,000.

II.

And for a further and separate and second counter-claim and cause of action this defendant, again referring to the said contract hereinbefore set out with the same force and effect as though the same were herein set out at length, alleges:

That while said factory hereinbefore mentioned was in process of construction under said plaintiff's supervision said plaintiff agreed for a valuable consideration with this defendant to care for and save all its fleshings, trimmings, and glue stock which were ac-
30 cumulating or should accumulate upon its hands or come to it by reason of its contracts or arrangements with the various tanneries in which this defendant's stockholders were respectively interested until said factory should be in operation, and agreed that until said date the said plaintiff would buy or market, at remunerative prices, all of such fleshings, trimmings, and glue stock as it, said plaintiff, could not save or preserve for use and consumption as material in said factory after it should have been put in operation.

But that said plaintiff failed and neglected to comply with or fulfill its said agreement, but allowed said fleshings, trimmings, and glue stock to accumulate upon the hands of this defendant, and neglected to sell or properly treat or care for the same, and permitted said fleshings, trimmings, and glue stock to become decayed and deteriorated from age and neglect and improper treatment, and so become very much impaired in value, to this defendant's damage $20,000.

III.

And for a third and separate counter-claim or cause of action against said plaintiff this defendant, again referring to the said contract with the same force and effect as though the same were again herein fully set out, alleges:

That the said factory in said complaint mentioned was ready for operation and went into operation about July 26th, 1899, and was thenceforward until the first day of December, 1899, operated under the supervision of the said plaintiff, pursuant to the terms of said contract; that in and by the said contract said plaintiff had obligated itself to sell the whole of the output of glue and by-products to be produced by said factory, but that, in violation of the
31 said contract and of its duty in that regard, the said plaintiff during the whole of said time failed and neglected to sell the output of said factory or any part thereof, save and except only the

grease, and not to exceed nineteen per centum of the glue produced therein, and failed and neglected to make any diligent or efficient effort to sell the same, although, as this defendant is informed and believes, all or at least eighty per centum of said product of glue could have been sold by said plaintiff at fair prices, remunerative to this defendant, if it had honestly made effort to sell the same and had not sold the products of other factories while it held the said products of this defendant's said factory unsold.

On information and belief this defendant alleges that at all said times said plaintiff wilfully and negligently refrained from selling or attempting to sell defendant's said output of glue to a greater extent than is hereinabove stated, although said plaintiff was at all said times continually carrying on the manufacture of glue in said factory to its full capacity, and such glue so unsold was constantly accumulating in said factory, and that at all said times said plaintiff was indirectly manufacturing and directly selling large quantities of such glue in and from factories other than that of this defendant.

That by reason of said defaults of said plaintiff this defendant was obliged to carry unsold, and did so carry unsold, glue so produced each month of the value of upwards of $20,000, and for such purpose to lose the interest on said sums, and storage, insurance, and other necessary charges on said product, and depreciation in market price intervening, all to this defendant's damage $15,000.

32 And this defendant alleges on information and belief that at all said times said plaintiff failed to exercise reasonable diligence in and in regard to the sale of the said output of this defendant's said factory or to procure proper prices for such of the said product as it, said plaintiff, sold, and that said plaintiff, for much of the said products or output of defendant's said factory which was actually sold by said plaintiff, negligently and in violation of its duty failed to procure prices equal to or as large as the market prices of such product prevailing at the times of such sales, and failed to procure as good prices as it could have procured by the exercise of proper diligence and honest effort, to this defendant's damage $2,000.

IV.

And for a fourth and separate counter-claim and cause of action against said plaintiff this defendant, again referring to the said contract with the same force and effect as though the same were again herein fully set out, alleges:

That said plaintiff failed and neglected to furnish to this defendant a capable superintendent for said defendant, but that the superintendent of said factory which said plaintiff furnished to this defendant, and whom, under the direction of the said plaintiff, controlled the operations of said factory, was inefficient and incapable of properly operating said factory, or of manufacturing glue of an uniformly high grade, or of operating the said factory economically and manufacturing such products therein as cheaply as they would have been manufactured by a capable and efficient superintendent.

And this defendant alleges on information and belief that by reason of the incapacity and inefficiency of the said superintendent so furnished for said factory by said plaintiff, and who so
33 operated the said factory under said plaintiff's control and direction, the cost of the manufacture of the glue and other products turned out at said factory was much greater than it would have been had said plaintiff furnished a capable and efficient superintendent and properly managed the manufacturing processes in said factory, and much of the said product was, by reason of its improper manufacture, inferior in quality and worth much less than it would have been if it had been properly and skillfully manufactured, to this defendant's damage $3,000.

Wherefore this defendant prays that the complaint of the plaintiff be dismissed, and that this defendant recover of said plaintiff damages in the sum of $60,000, besides the costs and disbursements of this action.

QUARLES, SPENCE & QUARLES,
Milwaukee, Wisconsin, Defendant's Attorneys.

STATE OF WISCONSIN, } ss:
Milwaukee County, }

Fred Vogel, Jr., being first duly sworn, on oath deposes and says that he is an officer of the above-named plaintiff, to wit, the president thereof, and makes this verification on its behalf, being duly authorized so to do; that he has read the above and foregoing answer and knows the contents thereof, and that the same is true of his own knowledge, except as to the matters therein stated upon information and belief, and as to those matters he believes it to be true.

(Signed) FRED VOGEL, JR.

Subscribed and sworn to before me this 21st day of February, A. D. 1900.

A. B. CAHILL,
[SEAL.] *Notary Public, Milwaukee County, Wisconsin.*

34 March 14, 1900.—This day came the plaintiff, by its attorneys, and filed its reply and demurrer as follows:

Reply to Counter-claim.

United States Circuit Court, Eastern District of Wisconsin.

DIAMOND GLUE COMPANY, Plaintiff,
vs.
UNITED STATES GLUE COMPANY, Defendant.

Now comes the above-named plaintiff and replies to that part of the defendant's answer herein purporting to set up a counter-claim as follows:

First. For a reply to the first counter-claim alleged in the defendant's answer, said plaintiff admits that the glue and grease to be

manufactured in the factory erected by the defendant were to be produced in whole or in part from fleshings and hide trimmings and other similar glue stock to be produced from the tanneries operated by the stockholders of said defendant, or in which such stockholders were interested, and that said plaintiff agreed, in the contract referred to in the plaintiff's complaint herein, to give to said defendant the benefit of its labor-saving devices and of its knowledge and experience used or acquired by it in the manufacture of glue, and to advise and plan with the architect of said defendant, and to oversee and supervise the plans of its factory, and to do all other things mentioned and specified in said agreement, but this plaintiff denies that it agreed or that it was authorized by said contract to plan or construct the said factory, and alleges that the plans of said factory were adopted by said defendant, and that the
35 number of vats therein were limited to three hundred and eight by the said defendant, and that the limiting of the number of vats to three hundred and eight and any and all insufficiency in the number of vats and their capacity or in the power to operate the said factory, or any other defects in the planning or construction of the same, were due wholly to the direction and action of said defendant, and were not in anywise caused by the failure of said plaintiff to perform the said contract in accordance with the terms thereof.

And for further reply to said first counter-claim this plaintiff denies each and every allegation therein contained, except as hereinbefore admitted, qualified, or explained.

Second. And for a reply to the second counter-claim and cause of action set forth in the defendant's answer said plaintiff denies each and every allegation therein contained.

Third. And for reply to the third counter-claim and cause of action stated in said answer said plaintiff admits that the said factory of the defendant was not ready for operation until on or about the 26th day of July, 1899, and that thereafter until the breach of the contract mentioned in the complaint it, said plaintiff, operated the same under and pursuant to the terms of said contract, and that during the time of said operation it handled and sold all the output thereof which it was able to dispose of, including the glue and by-products of said factory, but that said defendant was unwilling in many cases to accept the prices obtained by or offered by said plaintiff for sale of lots of glue and by-products manufactured by said defendant, and asserted the right to reject contracts of
36 sale and sales made by plaintiff in case its officers did not think the prices obtained by plaintiff adequate, and did even actually refuse to carry out contracts and sales of glue made by plaintiff on behalf of said defendant, giving as a reason therefor that the price obtained by the plaintiff was not satisfactory.

And for further reply to said counter-claim said plaintiff denies each and every allegation therein contained, except as hereinbefore expressly admitted, qualified, or explained.

Fourth. Said plaintiff, for reply to the fourth counter-claim and

cause of action set forth in the defendant's answer, denies each and every allegation contained therein.

Wherefore this plaintiff prays that the said several counter-claims be dismissed, and that this plaintiff recover of said defendant as prayed for in its complaint herein, besides the costs and disbursements of this action.

BANCROFT & ADAMS,
MILLER, NOYES, MILLER & WAHL,
Plaintiff's Attorneys.

GEORGE H. NOYES, *Of Counsel.*

STATE OF ILLINOIS, }
Cook County, } *ss:*

Arnold Freshman, being duly sworn, deposes and says that he is an officer, to wit, the secretary and treasurer, of said plaintiff, and makes this verification on its behalf and is duly authorized so to do; that he has read the foregoing reply and knows the contents thereof, and that the same is true to his own knowledge, except as to the matters therein stated upon information and belief, and as to those matters he believes it to be true; that the reason why this verification is not made by the plaintiff is because said plain-
37 tiff is a corporation and affiant is an officer thereof, acquainted with the facts; that his knowledge upon the subject is based upon documents in his possession and his relations with said plaintiff as such officer thereof.

(Signed) ARNOLD FRESHMAN.

Subscribed and sworn to before me this seventh day of March, A. D. 1900.

[L. S.] HARRY L. FEARING,
Notary Public, Cook County, Illinois.

Demurrer to Part of Answer.

United States Circuit Court, Eastern District of Wisconsin.

DIAMOND GLUE COMPANY, Plaintiff, }
vs.
UNITED STATES GLUE COMPANY, Defendant. }

Now comes the above-named plaintiff and demurs to each and every part of that portion of the answer of said defendant served herein, included between the fifth and ninth folios thereof, purporting to allege as a defense herein that the contract set out in plaintiff's complaint herein was void, and that no cause of action arose in favor of said plaintiff against said defendant by reason of the provisions of section 1770*b* of the Revised Statutes of the State of Wisconsin for the year 1898 for the reason that that portion of said

defendant's answer and the facts therein stated are not sufficient to constitute a defense in whole or in part to this action.

BANCROFT & ADAMS,
MILLER, NOYES, MILLER & WAHL,
Plaintiff's Attorneys.

GEO. H. NOYES, *Of Counsel.*

38 April 26, 1900.—This day came the parties, by their counsel, Mr. Geo. H. Noyes appearing for the plaintiff, and Mr. Chas. Quarles for the defendant, and the demurrer of the plaintiff to the answer of the defendant came on to be heard and was argued by said counsel and submitted, when the court took the same under consideration.

May 8, 1900.—This day came the parties, by their counsel, and on consideration of the demurrer of the plaintiff to portions of the answer of the defendant it is ordered by the court that said demurrer be, and hereby is, overruled (an opinion of the court being filed, found at pages 53 to 56 of this Record).

July 7, 1900.—This day came the parties, by their counsel, Mr. Geo. H. Noyes appearing for the plaintiff, and Mr. Geo. Lines for the defendant, and the plaintiff, by leave of the court, filed an amended complaint, and by consent it is ordered that the defendant answer the same within twenty days unless it elects to stand by its answer heretofore filed.

Which amended complaint is as follows:

Amended Complaint.

United States Circuit Court, Eastern District of Wisconsin.

DIAMOND GLUE COMPANY, Plaintiff,
vs.
UNITED STATES GLUE COMPANY, Defendant.

The above-named plaintiff for its amended complaint herein alleges that at the several times hereinafter mentioned it was and now is a corporation duly created, organized, and existing under and by virtue of the laws of the State of Illinois, having its principal office in the city of Chicago, State of Illinois, and that it was
39 at said times and now is a citizen of the said State of Illinois.

That at the several times hereinafter mentioned the said defendant, United States Glue Company, was and now is a corporation duly created, organized, and existing under and by virtue of the laws of the State of Wisconsin, having its principal office in the city of Milwaukee, in the eastern district of Wisconsin, and that at said times it was and now is a citizen of said State of Wisconsin, located and doing business in said eastern district of said State.

Said plaintiff further alleges that on and prior to the 25th day of June, A. D. 1898, it was engaged in the business of manufacturing, buying, selling, or otherwise disposing of and dealing in glue of dif-

ferent kinds and of by-products from tanneries and other establishments, and that it had factories located at various points in the States of Illinois, Indiana, Missouri, and elsewhere, with branches established for carrying on its business in New York, Boston, Philadelphia, Toronto, Canada, and other places, and was and had been extensively engaged in the manufacture of glue and other products and in the sale of the same from its own factories, establishments, and warehouses and from the factories and establishments owned by others located in various parts of the United States, all of which facts were well known to said defendant, its officers, agents, and stockholders.

Said plaintiff further alleges that prior to said 25th day of June, A. D. 1898, it had had large experience in the construction and operation of factories for the manufacture of glue and in the supervision and management of the same, and that its officers then possessed knowledge and experience in the construction and management of such factories and in the sale and disposition of their products and of all the raw material which is sold to or used by
40 companies engaged in the manufacture or sale of glue or any of its by-products, and that it possessed large facilities for selling and disposing of the same, all of which was at said time well known to said defendant, its officers, agents, and stockholders.

Said plaintiff further alleges that at some date prior to the 25th day of June, A. D. 1898, the said defendant was organized as a corporation for the purpose of purchasing or otherwise acquiring from the various tanneries located in the city and county of Milwaukee, Wisconsin, all the raw material and glue stock turned out by said tanneries at the market price, to be determined at a fixed time or times during each year, and to convert such glue stock, materials, and by-products of said tanneries into glue at a factory to be located and erected upon some site in the vicinity of the city of Milwaukee, Wisconsin; and this plaintiff alleges upon information and belief that in accordance with said agreement contracts were then or subsequently entered into by and between said United States Glue Company, when organized, and all or nearly all of the companies engaged in the tannery business which were located in or near the city of Milwaukee, Wisconsin, whereby the said defendant should take and pay for all such glue stock and raw material turned out and subject to be disposed of by said tanneries at a fair market price, to be determined at the first of or at some other time during each year, for a period of at least five years from the date of the construction of said factory by said defendant; that the sole or principal object of the organization of said defendant was for the purpose of enabling such companies operating tanneries in the city of Milwaukee to dispose of their glue stock of various kinds to a corporation controlled
41 by themselves and to forestall any unnatural decline in the prices of such glue stock; that all or substantially all the capital stock of said defendant is held and owned by said tanneries or by the stockholders in the companies owning and operating the same.

Said plaintiff further alleges that on or about the 25th day of June,

1898, an agreement was entered into by and between said plaintiff and said defendant wherein and whereby, in consideration of the mutual agreements of the parties, the said defendant agreed to erect, equip, and complete a glue factory on a site to be thereafter selected by it within sixty days from said 25th day of June, 1898, which said factory should be begun and completed by it with the least possible delay after such site should have been selected. Such plaintiff agreed to advise and plan with the architect of said defendant and to oversee and supervise the plans of said factory and secure such economy of space and processes as might be gained from the practical experience which said plaintiff had had in the operation of glue factories; and said plaintiff further agreed to give said defendant the benefit of all of its labor-saving devices and the benefit of its knowledge and experience which it had used or acquired in the manufacture of glue. It was further agreed between the said parties that said plaintiff should have the management of the manufacturing in said factory when completed, and should operate the same for said defendant, and should furnish a superintendent for such factory, whose salary should not exceed $150 per month, and that said plaintiff, by its officers, should give said factory such personal supervision as might be necessary from time to time in the operation of the same, and that said officers should give said defendant in the management and operation of said factory the
42 benefit at all times during the life of said contract of its experience and knowledge and of the experience and knowledge of its officers; that said plaintiff should keep said factory supplied with a capable superintendent at all times during the life of said contract, whose salary should not exceed the amount hereinbefore mentioned; that said plaintiff should control, handle, and sell the entire output, including glue and by-products, of said factory, and all such products should be billed and sold as the product of the defendant, but the invoices should be stamped "Diamond Glue Company, exclusive sale agents." It was further agreed between the parties hereto that, beginning as soon as said factory should be in operation, the said plaintiff should refrain from manufacturing either hide or calf glue at any of its said factories, and should guarantee the payments of all accounts for sales made by or through it. It was further agreed that said plaintiff should receive a commission of ten per cent. of the amount of all sales of glue or by-products, and that thereupon ten per cent. of the cost of the plant should be charged off each year for depreciation, and of the net profits remaining ten per cent. of the amount of the then capital stock should be set aside for its stockholders, and thereupon said plaintiff should receive ten per cent. of the excess of net profits over and above the said ten per cent. dividend so set aside for the stockholders of said defendant. It was further understood and agreed between said parties by said contract that the raw material sold to the said defendant by or for its stockholders should be sold to and purchased by said defendant at the fair market price for the respective grades thereof. It was further understood and agreed that said contract should

cover and extend over a period of five years from the com-
43 pletion and commencement of the operation of the plant so to be located and built by the defendant.

Said plaintiff further alleges that after the execution of said agreement, which was in writing and signed by the parties hereto, the said defendant selected a site for its said glue factory near the city of Milwaukee, in the county of Milwaukee and State of Wisconsin, and thereupon proceeded to erect and equip and complete said glue factory, and said plaintiff did advise and plan with the architect of said defendant and did oversee and supervise the plans of said factory so as to secure such economy of space and processes as it was able to do from its practical experience in the operation of other glue factories, and did from time to time, and as required, give to said defendant the benefit of all its labor-saving devices, as well as of the knowledge and experience it had used or acquired in the manufacture of glue.

Said plaintiff further alleges that the said plant was so located and constructed and was put into operation on or about the 25th day of July, A. D. 1899; that as soon as said factory was in operation said plaintiff did then refrain, and has at all times since refrained, from manufacturing either hide or calf glue at any of its factories, and did thereupon close down its factories before that time used for the manufacture of hide and calf glue and has not operated the same since said date, and on account of said agreement did, at great expense, fit one of them for the manufacture of other kinds of glue and leased *them* to other parties. Said plaintiff has at all times been ready and willing to perform the terms and conditions of said contract, and has in all respects fully complied with the terms and conditions of the same to be performed on its part.

44 Said plaintiff further alleges that upon the completion of said plant said defendant assumed the management of the manufacturing therein and operated the same, and said plaintiff furnished a capable superintendent therefor, whose salary did not exceed one hundred and fifty dollars per month, which was paid by said defendant, and said plaintiff, by its officers, did give to said defendant in its management and operation of said factory at all times during the operation thereof, and until the breach of the contract hereinafter mentioned, the benefit of the experience and knowledge possessed by said plaintiff and by its officers in respect thereto.

Said plaintiff further alleges that upon the commencement of the operation of said factory and the manufacture of glue therein said plaintiff sold all the output thereof which it was able to dispose of, including the glue and the by-products of said factory, until the breach of the contract hereinafter mentioned, and that all such products were billed and sold as the product of said defendant, but the invoices for the same were stamped "Diamond Glue Company, exclusive sale agents," as provided in said contract.

Said plaintiff further alleges that all such sales were made by it in the State of Illinois or elsewhere outside the State of Wisconsin,

and that all products of said factory so sold were shipped by said defendant to the parties so purchasing the same, and that all such shipments, except less than one per cent. thereof, were so made to places outside the State of Wisconsin.

Said plaintiff further alleges that said defendant was unwilling in many cases to accept the prices obtained or offered by plaintiff for sales of lots of glue and by-products manufactured by the defendant, but, on the contrary, asserted the right to reject con-
45 tracts of sale and sales made by the plaintiff in case the officers of defendant did not think the prices obtained by the plaintiff adequate, and in many instances did actually refuse and fail to carry out sales and contracts of sale of glue and by-products made by plaintiff on behalf of defendant, giving as a reason therefor that the price obtained by plaintiff was not satisfactory.

Said plaintiff further alleges that said contract was continuously recognized by said defendant as a binding contract, both by its acting thereunder and by its correspondence with said plaintiff from the time said contract was entered into to the time of the breach hereinafter mentioned.

Said plaintiff further alleges that said defendant, on or about the 20th day of November, 1899, claiming that the plaintiff had agreed in said contract to sell defendant's entire product, and that it had failed to do so, and claiming that for such reason it, the defendant, had a right to treat said contract as ended, threatened so to treat said contract, and for that reason, on or about the 28th day of November, 1899, requested the plaintiff to cease selling its product, and thereafter, on or about the 2nd day of December, 1899, definitely stated to plaintiff that the said contract was at an end and refused to be further bound thereby or to allow the plaintiff to make further sales thereunder.

Said plaintiff alleges that there is now due and owing to it from said defendant the sum of sixteen hundred and ninety-eight and $\frac{48}{100}$ ($1,698.48) dollars for and on account of commissions on sales made by said plaintiff for said defendant under and pursuant to the terms of said contract.

Said plaintiff further alleges that the services furnished by it in planning, overseeing, and supervising the construction of said
46 factory for said defendant and in giving to said defendant the benefit of its labor-saving devices and the knowledge and experience which it had in the manufacture of glue were of great value to said defendant, and which said services have not been paid for by said defendant.

Said plaintiff further alleges that it sustained great loss and damage in closing down its factories for the manufacture of hide and calf glue, in refitting the same as hereinbefore stated, in withdrawing from the glue-stock market as a purchaser of glue stock for said factories, in procuring customers for said defendant and in refraining from manufacturing either hide or calf glue at its factories, no part of which loss and damage has been paid by said defendant.

Said plaintiff further alleges that the output of said factory so

constructed and put into operation by said defendant, including its glue and by-products, would amount to at least three million pounds of glue per year, and that the grease supplied from said factory to be sold by said plaintiff under the contract if carried out would amount to at least one and one-half million pounds per year, and said plaintiff has been and will be deprived of its commissions on sales and of its profits under said contract by reason of the defendant's breach thereof.

That by reason of the premises and of the violation of said contract on the part of said defendant the said plaintiff has sustained damages in the sum of two hundred thousand dollars.

Wherefore said plaintiff demands judgment against said defendant for the sum of two hundred thousand dollars, with interest, besides the costs of this action.

BANCROFT & ADAMS,
MILLER, NOYES, MILLER & WAHL,
Plaintiff's Attorneys.

GEO. H. NOYES, *Of Counsel.*

47 STATE OF ILLINOIS, } *ss:*
County of Cook, }

J. R. Morron, being duly sworn, says that he is the vice-president of the above-named plaintiff, and makes this verification on its behalf; that he has read the foregoing amended complaint and verily believes the same to be true; that the reason why this verification is not made by plaintiff is because it is a corporation, and that none of its principal officers reside in the State of Wisconsin; that the grounds of deponent's belief on the subject are based on the contract referred to in said plaintiff's complaint and on other papers which are in the possession of deponent and from his knowledge of the transactions and from information received by him in his relations to and dealings with the parties as vice-president of said plaintiff.

(Signed) J. R. MORRON.

Subscribed and sworn to before me this 29th day of June, A. D. 1900.

[SEAL.] HARRY L. FEARING,
Notary Public, Cook County, Illinois.

48 And now, at this same term, to wit, January term, 1901, and on the tenth day thereof, to wit, on the 25th day of February, A. D. 1901, the following proceedings were had, to wit:

DIAMOND GLUE COMPANY
vs.
UNITED STATES GLUE COMPANY. } At Law.

This day came the parties, by their counsel, Messrs. Bancroft & Adams and Geo. H. Noyes appearing for the plaintiff, and Messrs. Charles Quarles and Geo. Lines for the defendant, and the issue herein came on to be tried. Whereupon a jury was called to try the

same, who came, to wit, John J. Abel, James Wallace, F. G. Birkel, Joseph P. Sterneman, H. C. Curtis, Adam Ruhl, Charles Lange, Charles Ormand, George Dance, John Mueller, Hugh Boyd, and C. E. Weipting, twelve free, honest, and lawful men of the district, who were severally sworn and empannelled, and, the trial not being concluded, the same was adjourned until tomorrow morning.

FEBRUARY 26, 1901.

This day came the parties, by their counsel, and also the jurors of the jury, and the trial of the issue herein was resumed, and, not being concluded, the same was adjourned until tomorrow morning.

FEBRUARY 27, 1901.

This day came the parties, by their counsel, and also the jurors of the jury, and the trial of the issue herein was resumed; and the jurors of the jury aforesaid, being charged by the court on their said oaths, respectively do say that they find the issue herein in favor of the defendant; and came the plaintiff, by its counsel, and moved the court for a new trial for reasons filed.

49 And afterwards, to wit, on the forty-third day of said term, to wit, on the 22nd day of April, A. D. 1901, the following proceedings were had, to wit:

DIAMOND GLUE COMPANY
vs.
UNITED STATES GLUE COMPANY. } At Law.

The motion of the plaintiff to set aside the verdict herein and grant a new trial for the reasons specified in the written motion herein having come on to be heard—Messrs. Miller, Noyes & Miller appearing on behalf of the plaintiff, and Messrs. Quarles, Spence & Quarles on behalf of the defendant—the court, upon consideration thereof, decides that said plaintiff is not entitled to have said verdict set aside and a new trial herein upon any of the grounds set forth in said motion, and expressly overrules the same, and thereupon denies said plaintiff's motion to set aside the verdict and grant a new trial herein.

Whereupon it is considered and adjudged by this court now here that the said plaintiff take nothing by its suit, and that the defendant do have and recover of the said plaintiff, The Diamond Glue Company, thirty-eight dollars and seventy cents, its costs about its said defense in this behalf by it expended, and that it have execution therefor.

Judgment-roll filed April 22nd, A. D. 1901.

EDWARD KURTZ, *Clerk.*

Costs, $38.70.

May 6, 1901.—Bill of exceptions signed and filed as follows:

50 *Bill of Exceptions.*

United States Circuit Court, Eastern District of Wisconsin.

DIAMOND GLUE COMPANY, Plaintiff,
vs.
UNITED STATES GLUE COMPANY, Defendant.

Be it remembered that heretofore the said plaintiff served and filed its demurrer to that part of the answer of the defendant served herein purporting to allege as a defense that the contract set out in the plaintiff's complaint was void, and that no cause of action arose in favor of said plaintiff against said defendant by reason of the provisions of section 1770*b* of the Revised Statutes of Wisconsin for the Year 1898 for the reason that that portion of the defendant's answer and the facts stated therein were not sufficient to constitute a defense in whole or in part to said action; which said demurrer coming on to be heard, it was contended, among other things, by counsel for the plaintiff, that the statute in question was void and inoperative under section 10 of article 1 of the Constitution of the United States, and also under section 8 of article 1 of the Constitution of the United States, and also under section 2 of article 4 and the fourteenth amendment to the Constitution of the United States; which contention was overruled by said court and an order entered overruling said demurrer; to which plaintiff did then and there duly except; that upon overruling said demurrer an opinion was filed by the Hon. William H. Seaman, judge presiding in said court, as follows:

51 United States Circuit Court, Eastern District of Wisconsin.

DIAMOND GLUE COMPANY
vs.
UNITED STATES GLUE COMPANY. } At Law. May 8, 1900.

Miller, Noyes, Miller & Wahl, for plaintiff; Quarles, Spence & Quarles, for defendant.

On demurrer to matter set up in the answer of defendant as barring the action.

The plaintiff is an Illinois corporation, and the complaint alleges as a cause of action breach of a contract entered into between the parties, which bears date June 25, 1898, providing, in substance, for the erection by the defendant, a Wisconsin corporation, of a glue factory near Milwaukee, Wisconsin, which was to be supervised and operated by the plaintiff for the defendant through the officers and superintendent furnished by the former for the term of five years from the completion of the plant, the plaintiff to have the handling and sale of the entire output, guaranteeing payment of such sales and retaining a percentage on both sales and profits. In consideration of such arrangement the plaintiff, having numerous factories in

various States engaged in manufacturing glue, with numerous branches and connections and extensive experience in manufacture and trade, agreed to supervise the plans for the factory and give to it the benefit of all its labor-saving devices and of its knowledge and experience in the business, and should refrain from "manu-
52 facturing either hide or calf glue at any of its said factories" after the defendant's plant became operative. The complaint alleges the completion of the plant on or about July 25, 1899, with performance on the part of the plaintiff as agreed, and that it thereafter refrained from the manufacture of hide and calf glue, and closed down its factories theretofore engaged in such manufacture, and at great expense fitted one of them for the manufacture of other kinds of glue, and proceeded with the management of the business of the defendant's plant in accordance with said agreement up to December 2, 1899, when said defendant refused to permit further performance, to the damage of the plaintiff $200,000.

The answer states various matters by way of defense, but demurrer is interposed to that portion only which sets up the invalidity of the contract by reason of non-compliance by the plaintiff with the provisions of section 1770*b* of the Revised Statutes of Wisconsin for the Year 1898, which prohibits any foreign corporation from transacting business or acquiring or disposing of property in the State until it shall have filed in the office of the secretary of state "a duly authenticated copy of its charter, articles of association or incorporation," and "all amendments thereto which may be made while it shall continue to do business therein," such filing to have the effect of constituting "the secretary of state its true and lawful attorney upon whom all summons, notices, pleadings or process in any action or proceeding against it may be served in respect to any liability arising out of any business, contract or transaction in this State," to "continue in force irrevocably so long as any liability" remains outstanding in the State. Penalties are prescribed for violations of the statute, and it is further provided that "any contract made by or on behalf" of such corporation "affecting the
53 personal liability thereof or relating to property within the State" before compliance "shall be wholly void on its behalf," but enforceable against it. This provision is contained in the revision of 1898, enacted at a special session in August, 1897, approved August 20, 1897, and made to go into effect September 1, 1898. The answer avers that prior to September 1, 1898, the defendant "had transacted no business with others than its members, except partially planning and making certain contracts for the construction of its said factory and acquiring a site therefor, and that practically all things which were done or attempted to be done by the said plaintiff" under the contract in question were done by it after that date.

SEAMAN, *Judge:*

As stated in Hooper *v.* California, 155 U. S., 648, 652, the principle is well established "that the right of a foreign corporation to engage in business within a State other than that of its creation depends

solely upon the will of such other State," and the exceptions to the rule "embrace only cases where a corporation created by one State vests its right to enter another and to engage in business therein upon the federal nature of its business." A corporation is an artificial being, the mere creature of local law, and has no legal existence beyond the locality of its creation. Recognition of its existence in other States and enforcement of its contracts made therein rest upon comity, and not upon inherent right. Bank of Augusta *v.* Earle, 13 Pet., 519, 588; Paul *v.* Virginia, 8 Wall., 168, 181. Dependent upon assent of the State, express or implied, it is clear that the assent may be granted upon such terms as the legislature may impose (Paul *v.* Virginia, *ante*), and that an enactment
54 within the power of the State which prohibits the transaction of business therein by foreign corporations, except upon compliance with certain conditions, invalidates any contract entered into in violation of the statute, so that the contract cannot be enforced in any court administering the law in such State. Cooper Manufacturing Co. *v.* Ferguson, 113 U. S., 727, 733, and cases cited. Where the prohibition is plain this rule governs equally with or without express terms in the State declaring the invalidity of the contract. Bank of United States *v.* Owens, 2 Pet., 527, 539, and citations in Notes on U. S. Reports, vol. 2, p. 870; Miller *v.* Ammon, 145 U. S., 421, 426; Aetna Life Ins. Co. *v.* Harvey, 11 Wis., 394, 396.

Upon these premises the matter set up in the answer states a good defense unless the statute referred to is inapplicable to the contract of which breach is alleged in the complaint. This contract was entered into after the enactment of the statute, but before its inhibition became operative. It is manifest, therefore, that the contract was not void *ab initio*, as the statute is not retrospective in terms and cannot be made retroactive by construction. The transaction of business by the plaintiff in Wisconsin was not made unlawful until the statute went into effect on September 1, 1898, and in the event of its qualification for a continuance of business by compliance with the statute no question could exist of its right to perform the contract nor of the obligation of the defendant thereunder so far as affected by this statute. But the contract as made was entirely executory, and its performance related to the management and control by the plaintiff of the proposed factory and its products, after completion of the plant and necessarily after the date then fixed for the statute to go into effect.

55 The contention of the plaintiff is in effect that by the making of the contract before September 1, 1898, and entry upon performance with the preliminary advice and supervision of plans on its part the statute became inapplicable to the transaction of business thereunder by the plaintiff during the term of the contract. In other words, that the doctrine of non-interference with contract obligations enabled the plaintiff to thus evade the impending prohibitory statute at will by means of its agreement previously entered into to that end. However the rule may be in reference to preserving rights, if any there be, which accrued through executed

terms of the contract so made, it is clear that the statute cannot be thus set aside by the act of the parties, and that it- provisions took effect on September 1, 1898, and incapacitated the plaintiff to transact business thereafter in the State except on submission to the requirements of the statute. That performance became illegal without such compliance on the part of the plaintiff, and that refusal by the defendant to carry on the transactions in deliberate violation of the statute constituted no actionable breach of the contract. The complaint alleged as the first breach the refusal of the defendant to continue the arrangement on and after December 2, 1899. It rested with the plaintiff to fulfill the simple requirements of the statute and become qualified for performance, and whether its failure in that regard, unless excusable, would constitute a breach on its part need not be determined. It is sufficient that performance became illegal without fault or concurrence on the part of the defendant, and in such view the answer states a good defense. The further contention on behalf of the plaintiff that the statute thus interpreted is obnoxious to the interstate-commerce provision of the Constitution is not deemed tenable. The fact that the products
56 of the factory are largely sold and shipped to other localities does not make the contract in question a transaction of interstate commerce in the constitutional sense.

The demurrer is overruled without passing upon the further question argued on behalf of the defendant as to the nature of the contract. So ordered.

At the time of the interposition of said demurrer of the argument thereon of the said ruling of the court the issues in said cause were joined upon the complaint following and upon the answer of the defendant now in the record and the said demurrer and the reply of the plaintiff now in the record.

(Here follows original complaint, which appears on page 3 of the record.)

Thereupon and after the said order of the court overruling said demurrer said plaintiff, upon leave of court, served the amended complaint now found at page 38 of this record.

Be it remembered that the above-entitled action having come on for trial before a jury upon the amended complaint of the plaintiff, the answer of the defendant and the reply thereto, the following evidence was adduced and the following proceedings had before said court, to wit:

JOHN R. MORRON, sworn as a witness on behalf of the plaintiff testified as follows:

I reside in Chicago and am vice-president of the Diamond Glue Company. I have resided in Chicago about 12 years, and
57 have been vice-president of the Diamond Glue Company since its incorporation, in 1894.

Plaintiff's counsel offer in evidence certified copy of the articles of incorporation of the plaintiff dated Jan. 25, 1894, marked Exhibit 1.

In June, 1898, I had had a large experience in the sale of glue, having had charge of the large sales of Armour & Company's business three or four years prior to the organization of the Diamond Glue Company. I had had considerable experience selling all over the country, all the way from California east in most every State, the products of our own factory and the product of other factories. Prior to 1898 the Diamond Glue Company had a factory at Madison, Indiana, and Chicago, Illinois, and it also handled the product of Schwarschild & Sulsberger, of Kansas City, of which we owned part. It manufactured bone glue, and we also handled the entire output of the Cudahy people. They had plants at Omaha and Sioux City and manufactured bone glue; likewise large purchases of glue we sold outright ourselves. This was all prior to 1898. I should say the Diamond Glue Company sold probably five or six million pounds of glue a year.

We purchased the factory at Madison, Indiana, at the time of our incorporation, 1894, and we bought the Chicago factory some time in 1895. In 1898 there were a great many glue factories besides those mentioned—Armour & Co., Swift & Co., Tamm Bros., California glue works, Peter Cooper, Becker, Adamson & Co., both in New England and Philadelphia, and innumerable smaller factories. At that time the American Glue Co., Boston, and Mulligan, Hegg & Co., New York; Hewett & Bros., of New York, and a good
58 many more handled other glue besides their own; at times I should say that almost all of them, with the exception of Peter Cooper, have been handlers of glue one way or the other—handlers or purchasers.

Glue enters into almost every manufactured article that you can think of; of course, to a greater extent in some than others. Furniture manufacturers are large users of glue, especially those that veneer, where they have to cover a great many surfaces, and paper manufacturers use large quantities of glue, and piano manufacturers, all high-class wood-work manufacturers, and the men that make these shades, these rollers, use glue; used for the sizing of the back of this carpet, and used in manufacturing desks, and in almost everything you can think of.

In 1898 Mr. Spiegel was president and Mr. Freshman secretary and treasurer of the Diamond Glue Co.

I think I first became acquainted with the defendant, United States Glue Co., at the time we made this contract with them. Mr. Vogel was president, Mr. Trostel was an officer, I think, Mr. Anstedt. In 1898 the Diamond Glue Co. received a proposition from the United States Glue Co. with reference to the selling of its proposed product and in relation to the construction of a factory and the sale of its product. The letter is dated June 22d. I think we received it and the accompanying paper the next day, June 23d.

Letter and proposals of June 22d offered in evidence for the purpose of showing the circumstances that led up to the execution of the contract; admitted and marked Exhibit 2.

After receipt of that letter and proposal we considered that propo-

sition that was made to us, and I went up there to meet the directors of the United States Glue Company, because there
59 were some things in the proposition that we could not concede to, and also we had to go up and see what arrangements could be made that would be mutually satisfactory. I wrote out a contract in our office before I went up and presented it to them for discussion, and we agreed upon it there in almost all the particulars. I prepared the contract myself.

I went to Milwaukee the day the contract was signed, June 25th, and met Mr. Fred Vogel, Mr. Trostel, Mr. Becker, and I think Mr. Anstedt was there, too. Nobody accompanied me to Milwaukee. The draft of contract shown me is the one signed on the 25th day of June, 1898, in duplicate, but is not all of the contract. There was an addition made that day which I confirmed in writing next day. (Witness shown paper.) That is the confirmation, made at our office in Chicago, dated June 27th, just a day or two after I returned from Milwaukee.

Papers offered and received in evidence, marked respectively Exhibit 3*a* and 3*b*.

After this contract was made Mr. Freshman, myself, and, I think, our superintendent, Morehead, came up here and met Mr. Vogel and Mr. Trostel; we went and looked at several places which we or they thought might be suitable for them to locate their plant; we went up north to a place where there used to be an old distillery or something of that kind, and didn't think it suited. We met Mr. Vogel that afternoon and went down along the lake where Carrolville is now, and that site was looked up and pronounced satisfactory to us all, and it was practically settled that we should take that site at that time as soon as we could get the property. We received no answer from the United States Glue Company with reference to this Exhibit 3*b*.

60 I should say the site was settled upon the first part of July, 1898, or perhaps the latter part of June. After that Mr. Vogel, for the United States Glue Company, sent down their architect and their master mechanic to Chicago. They met our superintendent and Mr. Freshman. Sketches were made in our office. We gave them our ideas in regard to the glue part of the building of the plant, which were taken by them to Mr. Vogel for his approval; that is all I know. The architect put these sketches, made in our office in Chicago, into the definite plans, and then they began to get bids on the construction of their factory. Mr. Vogel had it in charge. We spoke of Vogel more than the United States Glue Company, because we came more directly in contact with him. I don't think I saw those plans when completed; if I did it was just to glance at them. I didn't know anything about that part of the business. I had nothing to do with the plans or advertising for bids or letting the contract further than furnishing these sketches. The next time I remember seeing Mr. Vogel was in Chicago, in August or September, maybe. They had made a good many changes in the plans and he spoke about them. He told me about lessening

expenses, some things he wanted cut down. I don't know much about what it was, but the bids were pretty high, and he made some changes in the specifications to get them lower, so he told me. The next thing of importance which I remember was that Mr. Vogel wrote down that the work was progressing very slowly. I next saw him, I should say, in about November or December, up at Carrollville, where I went to look at the ground. They had broken ground; that is about all. We sent our superintendent, Mr. Morehead, up there about the time the plans were drawn; he stayed right there during the erecting of their plant and during the operation
61 of it, I should say, up to about the first of September, 1899. He was not in our employ at any time during that period. I sent the letter shown me at the date it bears to Mr. Vogel, with reference to this proposed factory.

Letter dated July 27, 1898, offered and received in evidence, marked Exhibit 4.

I do not remember any reply to this letter.

The factory was completed about the latter part of July, 1899. It was not completed January 1, 1899, as expected; Mr. Vogel had trouble with his contracts, and then it was very bad weather. I wrote this letter dated 10, 27, '98, now shown me, about that time.

Letter received in evidence and marked Exhibit No. 5.

I wrote the letter produced by defendant's counsel at the time it bears date.

Letter offered and received in evidence, marked Exhibit No. 6.

I think the endorsements in blue ink on the letter are in the handwriting of Mr. Vogel, I think: "U. S. Glue Co. Above addressed to Mr. Fred Vogel and answered January 31, 1899."

At the time that letter was written we had been notified of the prices of glue stock; we received this letter from them January 11, 1899.

Letter offered and received in evidence, marked Exhibit No. 7.

The members of the board of the U. S. Glue Company were tanners; the by-products of their tanning business were clippings from the hides and fleshings. Fleshings are fleshy particles attached to certain parts of the animal and left on the skin; they are taken off sometimes by machinery and sometimes by hand, and are not as good for the use of glue as straight hide stock. We received
62 the letter shown me from the United States Glue Co.

Letter dated July 17, 1899, offered and received in evidence, marked Exhibit 8.

I remember Mr. Hanson coming to our office. Our company gave him the information he desired or that we thought would be advantageous to him. He was shown, in regard to our method of keeping track of the cost of glue, what each item cost, what the labor cost, and also in regard to making out the bills that he would make out from the orders we sent him from our office in Chicago. We would send up a slip and he was to make out a bill for the U. S. Glue Co. I wrote this letter dated Feb. 6, 1899, to Mr. Vogel at the time it bears date.

Letter offered and received in evidence, marked Exhibit 9.

I don't remember whether there was any reply to that letter. We received this letter dated April 11, 1899, from the United States Glue Co.

Letter offered and received in evidence, marked Exhibit 10.

We received this letter from the U. S. Glue Co. dated May 6, 1899, at the time of its date.

Letter offered and received in evidence, marked Exhibit 11.

I wrote this letter of July 5, 1899, to the U. S. Glue Co. and received an answer to this last letter.

Letter of July 5, 1899, offered and received in evidence, marked Exhibit 12.

I answered that.

Letter, Vogel to Morron, dated July 7, 1899, offered and received in evidence, marked Exhibit 13.

63 The Darlington referred to in this and prior letters is an employee of Armour & Co., in the hide department. Kimball was Mr. Vogel's representative in Chicago. I received this letter of July 6, 1899, from the U. S. Glue Co. about the time it bears date. The letter dated July 7, 1899, is my answer.

Letter dated July 6, 1899, offered and received in evidence, marked Exhibit 14.

Letter dated July 7, 1899, offered and received in evidence, marked Exhibit 15.

I received this letter from the U. S. Glue Company about the time it bears date, July 12, 1899.

Letter offered and received in evidence, marked Ex. 16.

I received this letter and the enclosures from the U. S. Glue Co. about the time of its date, Aug. 5, 1899.

Letter offered and received in evidence, marked Ex. 17. (The letters are all marked Ex. 17 that are attached to the exhibit.)

I received this letter from the U. S. Glue Co. about the time it bears date, Sept. 2, 1899.

Letter offered and received in evidence, marked Ex. 18.

Mr. Bossert was master mechanic at the U. S. Glue Company's plant. I received this letter from the U. S. Glue Co. about the time of its date, Sept. 18, 1899.

Letter offered in evidence and marked Exhibit 19.

I received this letter from the U. S. Glue Co. about the time of its date, Sept. 21, 1899.

Letter offered and received in evidence, marked Ex. 20.

Mr. Hanson was the young man that went down to Chicago to take charge of their book-keeping and accounting, etc.

64 (Plaintiff's counsel ask for production of letters of Sept. 19th and Sept. 28th. Letter of Sept. 28 produced. Defendant's counsel say they do not find letter of Sept. 19th.)

I wrote this letter dated Sept. 28, 1899, to the U. S. Glue Co.

Letter offered and received in evidence, marked Ex. 21.

The endorsement in blue ink at the corner was not there when the letter was sent. It is in Mr. Vogel's handwriting.

Offered in evidence: "Trostel, please read and return to me; stirred them up."

I received this letter dated Oct. 14, 1899, about the time of its date.

Letter offered and received in evidence, marked Ex. 22.

This letter of Oct. 18, 1899, is my answer sent at the time of its date.

Letter offered and received in evidence, marked Ex. 23.

I sent this letter of Oct. 27, 1899, to Mr. Vogel about the time of its date.

Letter offered and received in evidence, marked Ex. 24.

I do not remember receiving any answer to that letter of Oct. 18th. The facts there stated are true and were true at that time.

I received this letter dated Oct. 28, 1899, in answer to the one just read.

Letter offered and received in evidence, marked Ex. 25.

There has never been at any time any connection between the Diamond Glue Co. and the Diamond Match Company, except that we sold them glue.

I think the letter shown me is a true copy of the letter written and sent to Mr. Vogel October 27th.

65 Letter offered and received in evidence, marked Ex. 24*a*.

I think I can tell whether any of those orders were filled if I see them. This order was not filled. This is the order for the Diamond Match Company—that is, the one you read the letter from, covered by this general description—No. 83 to the Diamond Glue Co., Chicago, 18 barrels, lot 38.

I sent the letter dated in pencil Nov. 3 to the U. S. Glue Co. about that time.

Letter offered in evidence by plaintiff, marked Ex. 26.

Objected to by defendant, first, on the ground that it concerns a proposed compromise, and, second, on the ground that it contains solely statements of facts or alleged facts made in the interest of the writer, the plaintiff.

COURT: The fact it is made in his interest would not make it inadmissible, I take it.

PLAINTIFF'S COUNSEL: Give me the one of November 16th, and we will have them all considered together.

Mr. QUARLES: Statements as to proposed compromise in the first instance, and, second, as to alleged motives on the part of the defendant.

Judge NOYES: It is evidence of the situation at that time, as shown by the correspondence between the parties.

Mr. QUARLES: And that letter was written for the purpose of making evidence.

COURT: I don't think the admissibility of the letter can be determined in that way, where it comes in as one of a series of letters. The rule is well understood that whatever is said by either party is not proof of a fact in any instance.

66 Judge NOYES: Except it be an admission.

COURT: Of course, where it is against the interest of the

party it might be considered as an admission of a fact; but a statement in a letter, an assertion of a fact, cannot prove a fact.

Objection overruled. Defendant excepts.

This letter dated November 16, 1899, is a true copy of a letter sent by me to the U. S. Glue Co. at that date.

Letter offered and received in evidence, marked Ex. 27.

My name was signed to the original. The conversation mentioned as occurring in my letter to Mr. Vogel took place at our office, in Chicago, between Mr. Vogel and myself. Mr. Vogel came in, and we talked about some other matters for a little while. Then he asked me what arrangements we could make to nullify the contract they had with us for the handling of their product. "Well," I said, "that takes me by surprise. We have been bound right up in this thing. I can't give you any answer to that proposition. Now, what do you mean by it?" He says, "That is what I mean. I think it is better to tell just what I mean right straight than it is to beat around the bush." "Well," I said, "I have got to consult with my associates on a matter of that kind. That is just the essence of the Diamond Glue Company. I can't make you any statement allowing you to get out of that contract." "Well," he says, "I don't want you to be too quick about it. Think it over and let me hear from you." That was the latter part of October. So I thought it over. Mr. Vogel asked me if I would write him a proposition of release to them. I said I would talk it over with my associates and write him. The result of that was this letter you have read.

67 Mr. Vogel stated that the reason they were going to break this contract was because they were not satisfied with the amount of glue they had on hand; that was the main thing—manufactured product. In the course of this conversation, although he did not use it as an argument at all, he said, "You remember at the time we made this contract with you we could have placed it in the hands of others to better advantage." I said, "Yes, I knew you could sell that glue at 7½ per cent. instead of 10." That is all that was said.

At that time, November 3, the Diamond Glue Company's factory at Madison, Indiana, had been closed, I think, since May of that year. The company's Chicago factory had been leased to manufacture another kind of glue, bone and mixed glue. There is just the same difference between hide and calf glue and bone and mixed glue as there is difference in their prices—that is, not going into the gelatines at all, a hide and calf glue sells anywhere from 14 or 15 to 12, or sometimes lower than that, and a mixed glue sells 8, 9, 7, and even lower than that. It is a different stock; it is not the same kind of material. There is less difference between mixed glue and bone glue than hide glue and mixed glue. The mixed glue is nearer to the better grade of bone product. The mixed glue is better as a product, take it as a whole, than bone glue. Bone glue is made by putting bones in the kettle and boiling them to a liquor; the liquor is extracted and made into bone glue. Mixed glue is

where they take hide or fleshings and cook them up separately or together; it depends; then the liquors are run together, and then it is dried into what is known as mixed glue. The Diamond Glue Company did not purchase any glue stock for manufacture of hide glue at its Madison factory for the season of 1899. The capacity of the Madison factory was, I should say, about 1,500 pounds of glue a day.

68 I received the letter of the U. S. Glue Co. dated November 15, 1899.

Letter offered and received in evidence, marked Ex. 26*a*.

I also received an answer to my letter of November 16th, dated November 18th.

Letter offered and received in evidence, marked Ex. 28.

The Diamond Glue Co. received this letter from the U. S. Glue Co. dated November 20, 1899.

Letter offered and received in evidence, marked Ex. 29.

We wrote and sent to the U. S. Glue Co. this letter dated Nov. 20, 1899, excluding from the letter the pencil memoranda upon it.

Letter offered and received in evidence, marked Ex. 28*a*.

The 375 barrels mentioned would represent something like 150,000 pounds of glue. The price named, 12½ cents, was a fair market price for that quality of glue at that time.

Referring to our letter of Nov. 20, 1899, to the U. S. Glue Co., Exhibit 28*a*, the pencil memorandum across the top is in the handwriting of Mr. Vogel.

Pencil memorandum offered in evidence in connection with Ex. 28 as follows: "Mr. Hanson, look up those glues and see how much below the average price they are, and telephone and write me. We can then decide if we wish to accept. F. V. J. R."

I wrote this letter of November 22, 1899, and sent it to the U. S. Glue Co. at the time of its date in answer to the letter of the U. S. Glue Co. of November 20, 1899.

Letter offered and received in evidence, marked Ex. 30.

The answer which I received from the U. S. Glue Co. is dated November 25, 1899.

69 Letter offered and received in evidence, marked Ex. 31.

I wrote and sent this letter to the U. S. Glue Co. under date November 24, 1899.

Letter offered and received in evidence, marked Ex. 30*a*.

I wrote the letter of November 27, 1899, shown me to the U. S. Glue Co. about the time of its date.

Letter offered and received in evidence, marked Ex. 32.

I received the answer from the U. S. Glue Co. dated November 28, 1899.

Letter offered and received in evidence, marked Ex. 33.

The copy of letter of December 2, 1899, to the U. S. Glue Co. is a copy from our letter book written to them containing the order. It is not my letter.

Letter referred to offered in evidence by plaintiff. Objected to on the ground there is no proof it was ever sent. Objection sustained. Exception by plaintiff.

The Diamond Glue Co. received this letter dated December 2, 1899, about the time of its date.

Letter offered and received in evidence, marked Ex. 34.

I had a conference with the U. S. Glue Co. about December 1st. I came up here. It was held at one of the rooms of the Pfister hotel. Mr. Vogel, Mr. Trostel, Mr. Zohrlaut, Mr. Anstedt, and Mr. Becker were there, and also Mr. Quarles. These gentlemen were directors of the U. S. Glue Co. and the tanners here in Milwaukee. This was about December 1, 1899. I went upstairs, and Mr. Vogel said that, as he had explained to me before, they were going to or had terminated their agreement with us on this glue business, and they were desirous of settling the matter amicably, and he wanted to know what I wanted to do about it. I told him
70 that my letter of—I think it was November 3d that I wrote—covered the ground about as thoroughly as I could in that matter. He said, "Well, we have got to do something about this thing, and haven't you got any other proposition to make?" I said I had no other proposition to make, and I told him we were doing everything in our power to move that product under the adverse circumstances. He said, "We want you to understand this agreement is at an end." "Well," I said, "you don't mean to say you are going to break this contract?" He said, "Yes; our attorney, Mr. Quarles, will notify you that we break this contract." Mr. Quarles did notify me. I asked him, "You break this contract?" Mr. Quarles says, "Yes; we desire to break this contract; we break it." I don't remember the exact words, but they asked Mr. Quarles to tell that to me. Mr. Vogel didn't answer the question; Mr. Quarles told it to me. I said to Mr. Vogel after they said that—everybody was talking, both to themselves and to me—"Mr. Vogel, I am disappointed in this matter, not only from the great financial loss there is in it, but in you. I want to know whether you break this contract yourself—want to know whether you intend to break it." He said, "Yes." I said, "Why?" He said, "We will pay no man 10 per cent. for selling grease for us." That was not our contract. They then offered me another proposition, and wanted to make another arrangement of some kind with me for handling the output of the factory, but with less commission on the grease. The new proposal was talked over by all of them, I think principally by Mr. Vogel. It was not in the form of a contract; it was not any definite proposition; they were talking it over, and they wanted me to take the glue at the same percentage of commission—10 per cent.—and then cut down the commission on the grease, I think it
71 was to two per cent. instead of 10; it may have been 2½. I told them I would not consider that.

They wanted to know whether I would recognize that they had broken this contract, and I said no. I told them I had not had any legal advice of any kind on this matter; I did not know anything about it. I was looking at it from a business standpoint, living up to the contract, and I didn't know how we stood if they desired to break it. I told them I would have to confer. I was up there all alone; I didn't have anybody to talk to about it. The Diamond

Glue Company afterwards received this letter from the U. S. Glue Co., dated December 4, 1899.

Letter offered in evidence by plaintiff; received and marked Ex. 35. Defendant objects to the introduction of the last paragraph of the letter on the ground it is a statement of a proposition for compromise. Objection sustained. Exception by plaintiff.

I wrote and sent this letter of December 5, 1899, to the U. S. Glue Co. There are some marks there I did not make.

Letter offered in evidence, without pencil marks, marked Ex. 36.

I received this letter from the U. S. Glue Co. about the time of its date (December 7, 1899).

Letter offered and received in evidence, marked Ex. 37.

I received this letter dated December 7, 1899, about the time it bears date.

Letter offered and received in evidence, marked Ex. 38.

I received this letter dated Dec. 18, 1899, from the U. S. Glue Co. about the time it bears date.

Letter offered and received in evidence, marked Ex. 39.

Q. What, if any portion of the accumulated glue stock in the hands of the U. S. Glue Co. did the Diamond Glue Co. buy
72 prior to the opening of the U. S. Glue Co. factory?

A. The Diamond Glue Co. took, I think, their fleshings for one month. If I am not mistaken, it was for the month of March, 1899.

Q. What were the circumstances of that purchase? How did the Diamond Glue Co. take it?

A. They kept telling us right along that the factory would be finished. First it was to be finished the first of January, 1899, and when we got there it was to be done the first of March, etc., and when we got to the first of March it was still put off, and they became congested—I mean they wanted to get rid of that glue stock; they kept shipping it down to Carrolville, where the plant was put up. The tanners interested in the U. S. Glue Co. shipped it down, and then they wanted to sell that glue stock every time, and it was a hard thing to sell glue stock at that time, especially at the prices they wanted for it, and we took the glue stock for one month—that is, the fleshings, the most perishable of all their stock, for one month at Chicago to help them out. When we found out that the factory was being delayed we wanted to sell that glue stock and recommended them to sell it. In 1899 the head office of the Diamond Glue Co. was in Chicago. It had a branch office and warehouse in Boston and Philadelphia, an agency in Toronto, Canada, and it had an office in New York city. Those agencies had been there, I should say, three or four years prior to 1899, all except New York. New York was there probably two years before that.

From the general office we had four salesmen—that is, from the Chicago office. From Boston we had a manager who did active work and handled what we considered to be the most important territory. He had traveling salesmen under him—sometimes two
73 and sometimes one. In Philadelphia we had a manager, and he also had a traveling man under him and a young man in

the office, so that both of them could go out and do work and bring results. There was a traveling salesman in Canada that covered all the territory between Toronto and Montreal.

We had no offices at all in the State of Wisconsin at any time after June 1, 1898. The Diamond Glue Company had no property at all in the State of Wisconsin.

Q. What were the methods employed by the Diamond Glue Company, aside from the use of traveling salesmen and these offices, in bringing the glue to the attention of purchasers?

A. By correspondence.

Q. Was any advertising done; and, if so, what?

A. No advertising done except through correspondence and putting of the glue out thoroughly by our representatives and correspondence and circular letters.

This glue is sold by sample. Every boiling of glue is different; no two are alike just because they are made from the same kind of stock, and then glue is used in so many different ways and is made scientifically. I can give you an illustration; in oak wood there is an acid, and we have to make the glue for that so that there will be an alkali in the glue; that alkali when it touches the acid in the oak will neutralize that acid; one will take care of the other, so you can get the best results; it will be adapted to some particlar purpose.

The salesman takes with him samples of glue to show what he has to sell. The quality is determined by test. There are two or three tests for different kinds of glue. Take a carpenter, or sash, door, and blind men, or any man on a farm in any place that wanted to glue anything together, he would naturally use soft wood—
74 pine—and we test this glue for viscosity. The solution would be about the same as molasses or syrup. The reason we give him a thick glue is that pine wood is porous; we would have to give him a bone glue like molasses so it would not soak into the wood. The salesman carries with him samples adapted to the various requirements of each business. The purchaser can tell what the glue is only by practical use of it.

Q. What steps did the Diamond Glue Co. take to put the product of the U. S. Glue Co. on the market after the factory began operations in July, 1899?

A. It sent its samples to every one of its salesmen, giving them prices.

We were supposed to fix the prices, but we did not. The U. S. Glue Co. fixed them. We did everything we could to put the glue on the market. We only had that glue for three months. We sold it and sent it around in sample barrels principally. Each one of those sample barrels was itself a salesman, because during the month of July and August most all the consumers of glue were contracting. They made a contract, a good many of them, at the beginning of January, the beginning of the calendar year. We gave this to our salesmen, and we knew a great many places the salesmen were going to place this glue was going to be where they could not get any immediate returns, because they were under contract with

other glue. We wanted to get a barrel of glue in and have them try it alongside of what they were using. They did that. Those were my instructions, so that when their contract expired that by the merit and quality of that glue, linked with our salesmanship, we could get those orders. We placed a good many orders by sample—
one barrel, two barrels, three and four—still they didn't
75 amount to a great deal in dollars and cents, they would all have brought in results.

Motion by defendant to strike out "they would all have brought results." Motion granted. Exception by plaintiff.

COURT: He may describe what was done, and if he is asked for expert testimony that is another thing.

My experience as a salesman in the handling of the product of different glue factories has taught me that in placing those sample barrels as we did for the U. S. Glue Co. that a greater majority of them would have resulted in securing to us our proportion of the contracts for which they were sent out as missionaries. We could not get the product of a new factory on the market thoroughly and intelligently in less than a year or a year and a half's time.

The estimated capacity of the U. S. Glue Co. factory when we were supervising the plans was for 30 to 32 million pounds of glue stock—to work that amount up. I figured that amount of glue stock would produce about 12 to 13 per cent. of glue; anywheres in the neighborhood of four million pounds of manufactured glue from that raw material. There is a great deal of difference between the operation of a glue factory in summer and at other times of the year. We have to put the jelly—after the liquor is cooked up from these hide pieces and fleshings it is in the form of liquor, and that liquor is put into troughs and then taken out and cooled. In winter it will cool in the ordinary atmosphere. In summer we have to put it in the ice-house. All that is extra labor and cost if it is a refrigerating machine, or cost of ice if it is an ice plant. It is a good deal harder to dry glue in the summer on account of the humidity. The glue is liable to fall through the nets. The best season to make glue is in the winter months.

76 I was acquainted with the market value of glue of the grades that were manufactured by the U. S. Glue Co. in 1899. The price glue would sell for depends upon the test of the glue and its comparative value. I should say that at that time a very fair price, amply high, would be 12⅞ to 13 cents a pound on the glue, taking the entire product. It would be impossible for me to tell about the grades; it would range above and below.

Samples were sent us of each boil of glue made by the United States Glue Company about twice a week. The conditions at that time of the year were very unfavorable for the selling of large quantities of glue. That was in July and August. September, October, and November are just the same. A good many people contract for glue beginning the first of January to the end of December following, and they take in their samples some time before, sometimes as far back as August, and sometimes they don't take them in until

December. I do not mean to say all the contracts are let that way. There is another thing about glue: If you offer anybody a large quantity of glue—take a carpenter or anybody that has got two barrels of glue and he uses two barrels a year, now there is no use going to that man and offering to cut that price a cent or two a pound in order to sell him five more barrels of glue, because he won't take it anyway and you make him dissatisfied with the price paid for the two and offer him something he can't use in two or three years. At that time in order to move large quantities of glue it would have to be sold at a reduced price.

The sales were made by our traveling salesmen all over the country. Those orders were sent to the Chicago office and there passed upon. I acknowledge every order that comes into the office
77 and no glue is shipped that does not come in there; every order is sent right in to me in the Chicago office, and I acknowledge every order; our salesmen would send in an order to our general office in Chicago, we will say to John Jones & Co., of Menasha, for one barrel of glue. We have a regular printed slip there which would be filled out on the typewriter where it says shipped to John Jones & Co., destination Menasha, put down one barrel, lot number, making the selection from our office and leaving the blank space open; above put the weight of the barrel, gross weight and tare, and then we would put in the price per pound. Then that went up to the U. S. Glue Co. They got that order and they filled in these weights I speak about, and then they made out the bill and sent it to the customer. They would send Jones & Company that bill and send us a copy so we could keep track of commissions they owed us. We were also responsible for the credits. We had to guarantee the account; therefore no order could be shipped until we had passed upon it in Chicago to say whether the credit was good. The price per pound was put in by us in Chicago with the lot number. If the price were not satisfactory to the U. S. Glue Co. the order would be sent back and would not be filled. There were cases of that kind. We had one yesterday that you showed me. There were others.

This bunch of papers now handed me are the shipping slips that we filled in, with the barrel number, the shipment, and price on it, which was sent up to Milwaukee.

When the glue stock is boiled, grease comes to the top. That is skimmed off and put into tanks, and after the liquor is drawn off the glue from these cooking vats there remains in the bottom of the vats a lot of stuff that looks like sediment; in other words,
78 we have taken all the glutin, and a mass of stuff remains in the bottom of the kettle which looks like white sawdust. We put that into gunny-sack material and put it in the hydraulic press and get the grease out of it. We put the grease that comes from that into the grease skimmed off, and in that way utilize everything in the animal. We sold about $14,000 worth of the grease in the 69 days, I think, that they operated the factory.

These bills contain the sales of grease as well as of glue. I think we sold all the grease produced during that time. I don't think

they kept any of it. I had no trouble in selling it. I think it sold from about 3½ to 3¼ cents. I have a list of all the sales of both grease and glue prepared from our books and the original papers there, and know it is correct. It shows the date of sales, the people to whom the glue and grease was sold, the price per pound at which it was sold, the number of the order and the date of the shipment, I think, of each one. This is one of the sheets from the book shown me of reports of sales. They are all on the same blank, made out substantially in the same way. It is a bill of shipment to William Ritter & Brothers, of Philadelphia, of a sale to him on Dec. 1, 1899. The shipment was made the 5th. The typewritten parts of the slip were made out by the Diamond Glue Co., in Chicago. The other portions in writing and the stamp were put on in Milwaukee or Carrolville by the U. S. Glue Co.

Paper offered in evidence, marked Ex. 40.
List of sales offered in evidence and marked Ex. 41.

I think there is nothing on this list which is not on this book of original orders. Everything can be checked from one to the other of these two.

79 After the U. S. Glue Co. notified the Diamond Glue Co. that it could no longer sell the product of the U. S. Glue Co. not a representative or agent or employee of the Diamond Glue Co. was withdrawn from the State of Wisconsin. No property of the Diamond Glue Co. was withdrawn from the State of Wisconsin.

Less than one per cent. of the total amount of sales made by the Diamond Glue Co. were made to purchasers in the State of Wisconsin. I should say that the average amount of glue that factory as constructed could produce would be about three million pounds per annum. The average price—that would take into consideration the probabilities of fluctuation—judged by my experience, would be 12½ to 12¾ cents. From my experience, I think it could be sold at 12½ cents if we were given a fair trial, one year with another, for four or five years. Judging in the same way, I should say the grease could be sold from 2¾ to 4¼ cents. The amount of grease the factory could produce would be two million and a half to three million pounds a year. That is estimated. I can't do any better than that. The price would be, say, 2¾ to 4¼. I have given a good leeway there. In my judgment, the Diamond Glue Co. could have sold the entire glue and grease product of that factory during the five years' life of that contract. I should say it would have cost the Diamond Glue Co., with our business as it was in 1899, about 4 % out of the 10 % commission to do that business. I arrive at that by figuring what our expenses would be in selling that. That four per cent. would not cover our cost of selling what glue we sold in the fall of 1899, because we had only a small run, 60 or 90 days. That was pioneer work. The volume of business we do is what decreases the selling cost per pound. That is where we are losers.

80 There is practically no difference in cost to us in selling an order of 1 barrel or a car-load. It is sometimes harder to get a barrel introduced than it is to sell a car-load afterwards.

The U. S. Glue Co. were supposed to send regular printed sheets of the boilings and manufacturing work down to us at the end of every month or every week. The papers handed me are the accounts received from the U. S. Glue Co. by the Diamond Glue Co. of the manufacturing. They tell the kind of material that has been worked up, how much glue was used, how much labor, how much the sundries are, and what the yield of the glue stock is—that is, the number of pounds of glue stock. We would keep track to see how much the stock was yielding. The sheets show that they were sent weekly. That date says up here, "manufacturing account for the week ending blank." I think these are all that the Diamond Glue Co. received from the U. S. Glue Co. The first one is for the week ending July 29, 1899, and the last one for the week ending November 4, 1899.

Received in evidence and marked Ex. 42 (fifteen sheets).

The Diamond Glue Co. had no other record or knowledge of the work of that factory that I know of. It had no control during this period between July and November over the prices paid for the labor of that factory, over the character, quantity, or prices of material or coal used, or over the nature and amount of the sundries charged. Looking at the sheets, the item under coal, labor, sundries, and material is dollars. The item "run" means how it is divided. For instance, when they cook up a lot of glue stock they take off what they call glue runs—that is, the top of it—and make that into a better glue. Then the next thing taken off, third or fourth, that will be another grade; and then take off the
81 fourth or fifth; that is the last one; that is separate. Those are called runs. The next column, cooler, means that when the glue material is cooked up it forms into a liquid and is run into coolers, and those I spoke of as having been put in the ice-house. The yield means number of pounds of glue that can be gotten from a certain number of pounds of glue stock. The final column, total cost, is coal plus labor, plus sundries and those things they put in there. I think the item at the bottom, cost per pound, is arrived at by those figures up here, dividing the total cost of yield by the number of pounds of glue made. I think there is not in these statements any credit or deduction for grease.

The item manufacturing cost means cost of producing the glue without any cost of raw material. To arrive at the amount in these reports they struck out the cost of raw material and took all these others, which are, a good many of them, arbitrary charges.

In the manufacturing account for the week ending September 16th there is no record of any glue being made, but the charges are here. The total items charged under that week are $286.75 for coal, $804.26 for labor, and $600 under the head of sundries. The items under sundries are entered $100 per day. For the week ending September 9th there are the same charges and no boilings. When I say the same charges it may not be exactly the same in dollars and cents. The $100 a day is just the same and labor and coal are about the same. There is another week ending September 2d, no

glue at all. But I see sundries increased to $719. Mr. Vogel stated those charges of $100 a day were interest; upon what I do not know. That was charged for each day during this entire period covered by these manufacturing sheets.

82 Manufacturing sheets, fifteen in number, running from week ending July 29th to week ending November 4th, offered in evidence, marked Exhibit 42.

The sales shown in the reports are all the sales made by the Diamond Glue Co. under the contract, and the commissions claimed are on a portion of those sales. I do not remember that the Diamond Glue Co. was called upon to pay any of those accounts by the U. S. Glue Co. under its guaranty.

Mr. Morehead was the first superintendent whom the Diamond Glue Co. sent to the U. S. Glue Co. I had known him ever since our incorporation. He had been superintendent of our plant at Madison and had been general superintendent at our other plant. We considered his competency for such work splendid. I think he remained superintendent of the U. S. Glue Co. at Carrolville or Milwaukee until some time the latter part of August, 1899. We furnished another superintendent by the name of Harden, who, I think, was a competent man. I guess he is there now. Mr. Morehead is employed by the Diamond Glue Co. as general superintendent.

Cross-examination:

The interview at Hotel Pfister on December 1, 1899, took over an hour. I think I came up on the 11 o'clock train that gets here about 2; it took from two to nearly 4; I think I went right down to the train after the meeting. There was quite a little conversation with me. I have not testified in detail all that took place there. I remember it was said on the side of the U. S. Glue Co. that the Diamond Glue Co. had failed to sell the output of the glue. They had said it before and said it then. I do not remember that I was informed there that unless that glue was sold the plant would
83 have to cease manufacturing. I remember that statement being made before and my thinking it was a queer one and laughing at it, but I don't remember it being made then. I didn't think it was a laughing matter they were running behind every day, but it followed out an argument that Mr. Vogel wrote me, trying to prove to me the best thing I could do was to allow him to break the contract because he would shut down. I thought it was a kind of a joke. I didn't think he was that kind of a man. I didn't take it seriously. I don't remember that it was said to me seriously at that interview that it would mean bankruptcy for that company to continue business under those conditions. That was not what I laughed at. I laughed at Mr. Vogel saying that he was going to break his word. I do not remember any discussion as to the cost of manufacture, because they would not take that up with me except in a general way. I remember making the point that he deducted the product of grease from the cost, but that question was only taken up

in a general way with me. I don't remember of having any figures deducted from any other figures at that meeting.

I remember they wanted me to state exactly when I could move that product of glue, and I told them it was an impossibility for any person, speaking honestly and intelligently, to state that. I said it would be impossible for anybody to give a definite date at which that glue could be sold, speaking honestly and intelligently. I have sworn here that it could have been sold by our company if we were given a fair chance and reasonable time; that it could have been sold within five years. These gentlemen did not ask that question of me; they asked me in regard to the stuff they had on hand.

84 Q. Don't you remember that you were asked there if you would make a new contract by which you would guarantee, or agree rather, to sell the output or some specific percentage of it?

A. Yes, sir; I remember I was asked that question; but not to apply on five years' contract.

As I remember my answer, it was that no specified amount of glue would be guaranteed by any reputable house to be sold on any time. I could have put a limit on it if we had been given a chance. I told you at the close of the interview I would like to have you send down, in writing, your various propositions. What I told you was, I would not guarantee to sell a specific amount of glue in a specific length of time, referring particularly to the excess of stuff you had on hand. You wanted to know how long before you could get it into money; that was the thing. It was not as a production.

Q. Was it not represented to you there that over 80 per cent. of the glue product of this factory was being piled up in the warehouse and held; and was not the question that was discussed with you as to whether you could relieve that pressure, not only for the excess then on hand, but for the future?

A. Yes, sir; that was talked over.

Q. What was your answer to that question?

A. Although I did not know anything about those percentages you gave nor did I come up with any figures just to talk it over, my answer to it was, We were trying to place your output for you intelligently. We had sent out those sample barrels; that in themselves would have brought back results, but we had had that glue practically only from the first of August until the latter part

85 of October, in a very dull time for the sale of glue and putting it out to advantage, and I thought in a great measure that accounted for the figures you gave us as to the amount of glue you held on hand down there and the amount we had disposed of. I told you particularly I thought the small percentage of glue you mentioned of us having sold was pioneers, and they themselves would work for you and would work for us.

We gave you no answer as to definite amount of glue we could sell at a specified time. We were unable to tell you what would be done. I remember I was pressed to say how much of that product the Diamond Glue Co. could put out. I do not remember finally

saying the only figures I could give would be that we could eventually move 60 per cent. I do not remember any such statement. I do not remember that at that meeting one of the objects they sought to reach was to get some assurance from me as to our ability to move this output. I would not swear those questions were not asked me.

Q. Don't you know they were asked you?

A. Incidentally; yes, sir.

Those questions did not get any definite answer from me. I think, I am sure of that. I think I stated that if we were given the time the product could be handled satisfactorily, because I always thought that, and if the question had been asked me at all that would have been my answer. I do not remember making any statement to the effect that this ten per cent. provided for in the contract to be taken off from sales in the first instance only covered the expense we incurred in making the sales. It was not that way. I think the question as to the character of a considerable amount of the glue product made at this factory was spoken of. I don't know as I said a
86 considerable part of it was off color and consequently not readily marketable; I know there was some.

I think I remember saying the Diamond Glue Co. sold five or six million pounds of glue a year; that is estimated. I think we sold that amount the year ending June, 1898, and about the same for the year ending in June, 1899. I cannot answer as to the number of pounds for the year ending June, 1900. At Madison, Indiana, we manufactured from cowhides and calf hides. We ceased manufacturing when this plant went into operation. We did formerly sometimes operate the Madison factory during the hot months. I think I said we were making about 1,500 pounds of hide and calf glue there. I cannot recollect how many days we operated the factory the year we closed down. I will try to ascertain.

We manufactured hide and calf glue at our Chicago factory. In a year ending the time named I think we would make a million and a half pounds. The Chicago factory was leased to the Northwestern Fertilizer Company.

From the first of January, 1899, to the first of January, 1900, I think we sold five or six million pounds of glue. We don't end our year just that way. At the same time, if we figure it up that would be just about right. We manufactured that year at Kansas City bone glue; that is all we manufactured ourselves. We had the outputs of the plant at Omaha and Sioux City. I should say about one-half we sold was hide and calf glue—that is, it would be from about a million six hundred thousand up to two million; that is pretty high, but I just approximate it. I think probably a million and a half would be about right. I should think our sales were perhaps a little larger in 1898. I could not tell how much larger without looking it up; 1897 and 1898 would run along about
87 the same, except that our business would naturally increase.

We got some of the hide and calf glue sold in 1899 from the U. S. Glue Co. I think these reports show the amount in pounds; the dollars and cents I am not sure of.

I think we sold about five hundred thousand for the U. S. Glue Co. I could not tell as to the memoranda of 139,000 pounds by glancing at it. I should have to add this all up in order to do that.

We got the rest of the hide and calf glue handled by us from Gonsling & Fisher factory, Gowanda. It was less than was sold for the U. S. Glue Co. I think the Gowanda factory went into operation in the early part of 1899. Our relations to that factory were practically the same under practically the same contract as with the U. S. Glue Co. That contract was made in 1898. The estimated capacity of the Gowanda factory is a million and a half or two million pounds. We had a contract with Robert H. Foerderer that we delivered some goat glue on. That is somewhat similar to this hide and calf glue.

The capacity of the Chicago and Madison factories would be about 1,800,000. We got about the same amount of glue from Federer in 1899 as in 1898. We did not sell all the output of our concern in 1898. It is impossible to sell the output at any specific time. I could not tell you how much we had on hand in May, 1898.

I am general manager of the company and attend more particularly to the sale of the glues. I took no practical part in the building and equipment of the Milwaukee factory. I was here or at Carrolville once during construction, about the time it was finished. Mr. Freshman consulted with the U. S. Glue Co. in regard to the construction. Mr. Morehead was the man we furnished the
88 U. S. Glue Co. I am not familiar with the details of that factory and its construction. I am familiar somewhat with the reports that were made as to the causes of the delay in the construction. These reports were made by Mr. Vogel. With the technique of the building of the factory I am not familiar.

Q. Do you know how many vats were originally planned for the building?

Objected to as not proper cross-examination. Objection overruled. Exception by plaintiff.

A. Not the exact number.

I had no personal part in the matter of the purchase and disposal of the fleshings prior to the last of July, 1899, when this glue factory went into operation. I knew the Diamond Glue Company took the fleshings thro' the month of March, 1899. That arrangement was not made by me. We were not manufacturing at that time. We sold that glue stock to J. Spiegel & Co., dealers in raw material and handlers of grease. J. Spiegel is president of the Diamond Glue Co. The Diamond Glue Co. really emanated from that old concern. They went out of the business, as the Diamond Glue Company, composed of Spiegel, Freshman, and myself, went in. Mr. Spiegel is president, I am vice-president, and Freshman is secretary and treasurer of the Diamond Glue Co. The Spiegel Company sold the glue stock to a number of parties. They are in the raw material business, and that glue stock is some of it dried—all that is bought in that way.

Q. Did you sell some of that to the N. W. Fertilizer Company—the Diamond Glue Co. under another name?

Objected to. Objection overruled. Exception by plaintiff.

89 A. Why, I think probably some of that stock was sold to the N. W. Fertilizer Company.

I do not remember what prices we got. I advised the U. S. Glue Co. to sell its glue stock. I gave that advice to Mr. Vogel and to Mr. Zohrlaut. I can't give the exact date, but after we found out they were not building their factory in time they tried to sell their glue stock right along. They made offers of it and nobody wanted it. They offered it to Armour & Company. Mr. Zohrlaut said so in Chicago. I can't give you the date. Mr. Vogel has covered it by correspondence. There is a letter pertaining to it. I think the U. S. Glue Co. commenced accumulating glue stock from the first of January, 1899. I advised them to sell that glue stock when they said they were going to complete their factory by March 1st. Mr. Vogel said that. Then we didn't advise selling the accumulation of, say, a couple of months, but after that we advised them to sell, and they wanted to sell; we had no control over it.

(Plaintiff's counsel hands Exhibit 7 to defendant's counsel.)

This is the letter I refer to as fixing the time of Mr. Zohrlaut's attempt. That is January 11, 1899. I advised them to sell their fleshings or glue stock at that time. The letter speaks something about purchasing new stock from some one by the name of Woelfel. It reads as follows: "Your letter received from Mr. Woelfel, of Morris, Illinois, and would like to hear from you whether you know his stock—what price you want to make for his next year's production." I do not know personally of the U. S. Glue Co. buying some glue stock from Gallun in May, 1899. I know they wanted in some way or other to get Gallun into this combination. I am not fully posted whether they bought then or not.

90 On these weekly statements, there are offered here as statements of expense of manufacture simply four elements, coal, labor, sundries, and material. In regard to sundries, $100 a day I understand to be charged for some kind of interest; we have never been able to find out on what. That was the particular arbitrary charge. I can't analyze these sundries to you here now. If we had your book showing what the sundries meant, we could tell you. Insurance on the plant and stock would be a part of expense. Whether repairs would be an expense item would depend upon the kind. If you were going to put in a lot of repairs for the benefit of years to come, you could not charge them under the head of sundries. The barrels for the glue ought to be in labor, and I think you will find it there. They coopered the barrels after they got there. Buying the barrels would come under the head of actual expenses; possibly come under sundries. There is no particular item for it. They never gave us any intelligent idea of that.

Mr. Vogel first told us you would have fifty million pounds of glue stock a year to be worked up. That was the original estimate.

They overestimated the supply the tanners had, and always they expected to get others into this company. The capacity of the plant as they would ultimately want it was 30 million pounds glue stock. I should say that meant about four million pounds of glue. The glue stock would carry out 15 to 30 % glutin. That is my estimate of it.

Redirect examination:

I was not asked to bring my attorney at that interview of December 1, 1899, to meet Mr. Quarles. I was not notified that these five or six gentlemen representing the U. S. Glue Co. were to
91 have their attorney there to question me. Mr. Quarles participated in that conference quite extensively. I found these gentlemen all downstairs in the Pfister hotel waiting for me. I got here on the train about 2, and caught the 4 home. I don't know whether they had a stenographer anywhere behind any screen in the room. I don't remember any screen, and I didn't examine the closets. I said this in that conversation regarding the 10 per cent. commission. I said on this pioneer work, the starting out and putting out these sample barrels to the trade, that it would cost fully 10 per cent. The benefits we expected to reap would be cut off from it. That statement was true. I was asked as to the amount of hide and calf glue we sold during the year 1899, and I mentioned the products of the Foederer factory, the Fisher factory, and the U. S. Glue Co. I was giving in those figures a statement for the entire year. We handled the U. S. Glue Co. practically about 60 days. I have a memorandum of the respective amounts for Fisher and Foederer during the period between July 26th and December 11th, 1899, and the average price. I would like to say that these are comparative statements between July 26 and December 11, but you know we didn't get into the harness to handle the U. S. Glue Company glue until along in September. The first sales was 1st of September. I have the total amount of sales for these three companies between the two dates mentioned. We sold for the Fisher contract, which is the one at Gowanda, 118,000 pounds of glue, amounting to $15,608. We sold for Foederer, the factory in Philadelphia, during the same length of time 80,926 pounds, amounting to $9,908.42. For the U. S. Glue Co. we sold 139,134 pounds, of a total of
$18,167.90. The average price for the Fisher glue, which
92 contained considerable gelatine, was 13.22 cents a pound; for the Foederer glue, 12.24 cents, and for the U. S. Glue Co., 13.06 cents.

At the time I had this conversation with Mr. Zohrlaut and advised him to sell the stock he told me the prices that Darlington (Armour & Co.) offered him. They were ridiculous prices. I think it was 2 cents for calf and a dollar seventy-five for hide trimmings, and seventy-five for fleshings. I don't remember exactly. I think my prices were stated right. I had some talk with Mr. Zohrlaut relating to the portion of Mr. Vogel's letter of January 11th, in which he says he is rather put out at Darlington's prices. They were put out because when he got there Darlington didn't offer him

anything for his stock. Darlington was trying to stick the glue factory up here and discourage the tanners.

They just said they could not consider the offer that Darlington made after Mr. Zohrlaut went to Chicago. They didn't even repeat the price to us, except to say they were very much disappointed. They meant materially lower prices than this, and Mr. Vogel says he is put out because Darlington didn't keep up to the bluff he made.

At the time of the conference of December 1st nothing was said by Mr. Vogel or any of the other directors present as to what investigation of the Diamond Glue Co. they had made or why they made this contract with it. I did not at any time prior to the making of this contract state to the U. S. Glue Co. or any of its officers the amount of the average sales of the Diamond Glue Co. I don't remember that the question was ever asked me.

(Witness shown paper.) This is a true copy of a letter I wrote and sent Mr. Vogel about March 30, 1899, the time it bears date.

Copy of letter offered in evidence, marked Ex. 43.

93 Recross-examination:

I cannot give you an idea of how much more we sold during 1899 for the Gowanda people than this 115,000 pounds. It is a comparative statement only of the same length of time we were handling your production. I cannot tell now how much we sold for them altogether in 1899. I can ascertain from Chicago. I think we began to sell for them some time during the early part of 1899.

Arnold Freshman, sworn as a witness on behalf of the plaintiff, testified as follows:

I reside in Chicago; have been engaged in the manufacture of glue for myself about 14 years. In 1875 and until 1876 I worked in my father's glue factory. In 1876 I went into business for myself in the city of Cincinnati. At that time I speculated in dealing in manufactured glue, and dealt in raw material for manufacturers of glue. I then had no factory. I continued in that business, I think, about 13 years. About 14 years ago we went into the business of manufacturing glue in Cincinnati. I think the factory turned out from 800 to 1,000 pounds a day, mostly of hide glues. This factory was located in Madison, Indiana. We had an office and stores in Cincinnati. I became connected with the Diamond Glue Company at the time they incorporated, January 25th, 1894. Since that time I have been secretary and treasurer of that company. I have charge of the factories, and also head of the department of the office. I am not what you would call a practical glue manufacturer. I know all about glue. I never boiled any glue, but I know what good glue is and what bad glue is—know the difference—and how glue ought to be made. In 1898 there were known to
94 the trade bone and hide glues and gelatines. Bone glues are made out of bone liquors. Hide glues are made from

hide, calf, and fleshings. Calf stock will make stronger glue than hide stock. It being young, it don't take so long to boil. It will make a better quality of glue than hide trimming. Gelatine is classed as glue in a way. It is generally made out of the first run of either hide or calf.

The first I had to do with the construction of this plant of the U. S. Glue Co. was when Finkler, Bossert, Morehead, and myself went out to the Diamond glue factory at Chicago and looked over things to get a general idea of the factory. We went back to the office and made some drawings. I think Mr. Morehead had some drawings ready; I saw them. Mr. Vogel figured in our office he expected to have 30 to 32 million pounds of stock, and he wanted to work that stock up, and that is the size of factory he wanted—to work up about that quantity of stock in one year's time. He told us he expected to get that glue stock from the Milwaukee tanners, and he expected some of the Milwaukee tanners, and also Captain Booch, N. R. Elens and Son, to join the U. S. Glue Company. These people were producers of glue stock. The sketch referred to was prepared for a plant of the capacity named by Mr. Vogel. The plans were sent up by Mr. Morehead to Milwaukee, and Mr. Finkler, the architect, made some drawings, and about the time they were finished I went up there and looked things over and talked things over with Mr. Morehead. Mr. Morehead was then employed by the U. S. Glue Company in Milwaukee. I think these plans were turned over to the architect in August, 1898.

I think I came up a little later when the bids were opened. It was in Mr. Trostel's factory, and the gentleman had gone
95 over the figures what the tannery would cost. This was in the afternoon. Mr. Vogel, Mr. Trostel, Mr. Finkler, Mr. Bossert were present. I am not sure whether Mr. Anstedt was there or not. I don't exactly remember the date, but it was about three weeks later than the first visit. I know the plans were all finished and bids in, and they wanted to talk over the bids. I think some minor changes were made in the plans between the time the sketches were made and the bids opened. I think they were made by Mr. Morehead. They were not exactly by my direction, but we talked things over, and Mr. Morehead probably made some little changes, but they were of minor character. I think the only suggestion I made was that we ought to have more windows in the boiling-room. The contracts were not let while I was in Milwaukee, and I had nothing to do with them. I think I went up to Milwaukee again about the time they broke ground some time in December and looked over the situation. I don't remember whether I saw Mr. Vogel. I don't think I went up again until the buildings were going up.

Bossert and Morehead in a general way talked about delays and on account of the weather was the main thing, and then on account he could not get the lumber, could not get the bricks; there was delay all round, especially the delay, I think, was on the bricks and lumber; they could not make any progress. They expected when I talked with Mr. Vogel in Chicago to have the plant up by Janu-

ary 1, 1899. I went to Carrolville several times during the time the buildings were going up and just stayed an hour or two. I didn't do anything in regard to the architect's part; I simply talked over matters how things were progressing with Mr. Morehead. The most part I was interested in was to have the factory go up as quick as possible and trying to hurry the thing along. In Chicago
96 at the time the drawings were made we talked over in a general way how it would be best to construct a factory. Mr. Bossert had charge of the machinery part of the factory. He was master mechanic of the Pfister & Vogel Co., then acting for the U. S. Glue Co. I did not read the contracts or have anything to do with the contractors while at work. The factory was completed, I think, the latter part of July, 1899.

The Diamond Glue Company own the Madison factory, Chicago factory, and is part owner of the Kansas City factory, called the S. & S. glue factory. I had handled the product of the Cudahy factory prior to this time. I had handled the product of that plant from its commencement.

When this factory was completed I think its capacity was 10 or 12 thousand pounds per day. When the factory was completed some of the stock, owing to the delay in putting up the factory, was in the lime vats too long and was overlimed. I refer now to the fleshings. If the fleshings are left in the vat more than 10 or 12 days it gives a weaker glue and less yield. The lime will eat up some of the glutinous matter in the stock. These overlimed fleshings came from the tanners at Milwaukee. I had nothing to do with the condition of the stock when it came to the U. S. Glue Co. factory or after it came there. The stock came in fast and the factory was progressing very slow; naturally the stock had to be piled up. This made it more expensive handling the trimmings from one end of the building to the other and then again into the vats; really handling them two or three times instead of one. That was after the factory commenced operation; it cost considerable more money to handle the glue stock. They didn't have as much warehouse capacity as it was expected to take care of the stock as it came in. It was
97 piled all over the factory wherever they could find space to take care of the stock. The tanners claimed they could not hold it any longer, and had to ship it in. If there had been no accumulation of stock, and the stock had come in regularly, as the factory was designed to receive it, the trimmings would have been taken care of and put in vats and treated for the making of glue. There is a railroad track through the center of the vat-house. The cars are put in the vat-house. The stock is taken into the washers and washed and put into lime vats. The trimmings are washed to get the soil out of them before being put into the lime vats. They are taken from the washers by wheelbarrows and thrown into the lime vats, where they are treated, and put back into a new bath of lime until ready for boiling. It takes about 60 days to get them ready for boiling. After being limed they go into the washers to be thoroughly treated with acid, for the purpose of killing the lime in the stock. Then they are boiled. The capacity of the factory for

liming was about 24 million pounds of stock. They have the same liming vats for fleshings and trimmings.

At the time Mr. Vogel was in our office I put the question to him what proportions he expected the 30 or 32 million stock would be, and he said, "I think it will be about one-third hide and two-thirds fleshings." I do not know exactly what the proportions of the stock accumulated there were.

The vat capacity was for 24 instead of 32 millions, because at the time the bids were talked about each of the tanners brought in the amount of stock they produced the year previous, and instead of 30 to 32 million pounds of stock they found they would only
98 have a maximum of 17 million pounds. That was figured up by Mr. Vogel himself. Mr. Vogel and the other gentlemen thought it would cost too much money, and they talked over whether it could not be reduced, and they wanted to know from Mr. Morehead and myself if it were possible to reduce the cost of the factory. After finding they had only 17 million pounds of stock we told them we could reduce some of the vats—some of the boiling kettles and minor things. They were figuring putting in carriers, which would have cost five or six thousand dollars. They wanted to leave that off for the present. In other words, they wanted to reduce the cost as much as possible of the factory. I talked it over with Mr. Morehead, and we came to the conclusion we could get along with less vats. The vats were put up in sections in different parts of the building. We came to the conclusion by putting in about 300 vats there would be enough of a plant. The bids contemplated a little over 400. The plans will show. The total number as constructed was, I think, 307. That was more than enough to take care of the liming of 17 or 18 million pounds of glue stock coming in regularly, in the general proportions of one-third trimmings and two-thirds fleshings. The vats are 8 x 8—four feet deep. Each will hold about 5,500 pounds of trimmings at one time for liming. They are large enough for about 7,000 pounds of fleshings at one time. It takes about 50 or 60 days for trimmings and 10 to 12 for the fleshings.

There were difficulties in the early boilings of the factory. The main difficulty was labor. They could not get any men. They were short of hands to handle the stock. They tried to get all the men they possibly could, but they were always short.

The best season for the manufacture of glue is in the fall
99 and winter. The worst is in the summer. From my experience you can never start off a factory running smoothly. It is like building a house; always find some little thing missing; same thing in factories. When you start off there is this and that wrong. It always takes a little time to get the thing in proper shape. At this time there was no glue factory in this part of the country.

After the glue was boiled I got the samples in Chicago and tested it. After the testing we assorted them in different grades. Glue is ordinarily sold on test. I was acquainted with the market prices of glue stock of the character that was turned into this U. S. Glue Co.

factory in 1898. We had had contracts with the Milwaukee tanners for years. We bought stock in other quarters besides. I had handled glue stock since 1876. In my judgment at that time fleshings were worth about 40 cents per hundred pounds, trimmings about $1.25. Calf trimmings were worth about $1.50 a hundred pounds. I am acquainted with what are called the manufacturing sheets put in evidence. I examined them as they came in. The Diamond Glue Co. keeps sheets for this purpose. We showed Mr. Hansen how to keep these sheets when he came to Chicago. Their methods of keeping the accounts differ from ours. There is a certain charge there of $100 a day for interest, they call it, which we never charge. I think the blank is our blank. I talked with Mr. Hansen, and, I think, Mr. Vogel, about the way these sheets were filled in. Mr. Hanson said the $100 was Mr. Vogel's orders. I don't think he knew it himself, simply it was done according to Mr. Vogel. Interest, or wear and tear, I don't know what they called it. I never got at the bottom of it. I spoke of it several times. In
100 making up a proper statement of manufacturer's cost of glue, the items of coal, labor, zinc, acid, and barrels should go in. I would add to these items the glue stock to get the cost of the entire product, deducting the grease. The grease was never deducted from those figures. To arrive at the net costs of the glue you have to deduct the yield of grease. They haven't done it in this case.

From a computation based on the figures in this statement the prices for materials would be two cents for calf trimmings, $1.75 for hide trimmings, and 75 cents for fleshings. Some horse fleshings went in. I am not quite clear whether they put them at 60 cents or higher. It has slipped my memory. I think they went in for less than the cattle fleshings; if I am not mistaken, at 60 cents. In my judgment a fair market value for the horse fleshings in 1899 was about 20 cents a hundred. I really don't know whether it was customary with anybody else to figure an item of $100 a day for interest or account of capital, to be included in sundries and used as a basis for figuring either the cost per pound of manufacturing or the cost per pound of glue; it was not with me. I never figured interest on the manufactured article and I don't think I ever heard of anybody making any such charge.

During the operation of the plant I did not at any time give any orders of any kind or directions as to any of the U. S. Glue Company's employees. I never at any time determined any of the prices that were to be charged or to be paid by the U. S. Glue Co. for its glue stock. I never determined any of the salaries or the prices to be paid for any materials, fuel, or otherwise, that were to be used in the operation of that factory. Nobody connected
101 with the Diamond Glue Co. ever did.

The factory should be run at its full capacity. It thereby reduces the cost of manufacture. In other words, the expense of manufacturing is so much less per pound by running the factory to its full capacity. All the items of expense in operating are practically the same whether the product is up to the capacity of the

factory or only a small production, with the exception of additional labor. The labor would perhaps be a little more, because we had to handle more stock, but it would not be very much. If the factory ran full capacity one day and half the next it would only make that much less glue. You make up one day, you lost the other. For the week ending September 30th the manufactory was run to its full extent two days. The week of October 7th there were four days. The sheets show October 3rd, 12,334 pounds; October 4th, 13,822 pounds; October 5th, 10,480; October 7th, 12,492 pounds. Then the week ending October 14th there were three days. I make it that it ran at full capacity only 17 days.

Cross-examination:

The plant was not operated to its full capacity because of a shortage of steam power. Bossert did not put enough boilers in, made miscalculations. Three were put in and one old boiler in the vat-house afterwards. There were four boilers on the plans, 1,100 and some horse-power all told. 1,100 horse-power were put in.

Q. How many did the plans call for?

Objected to as not cross-examination. Objection overruled. Exception by plaintiff.

A. Fifteen, I think, was told to Bossert was needed; 1,500 horse-power.

102 The Diamond Glue Company did not operate the factory at all. It assisted in the operation. I used to come to Milwaukee and I used to talk over things with the superintendent; assisted in an off-hand way; used to go there twice or three times a week and talk things over so as to help him along, see how things were going. I gave no directions in regard to running the factory. My understanding is that all the Diamond Glue Company did in regard to operating the factory was to assist and advise.

In our own factory's account the items, zinc, acid, and barrels, went into sundries. The rent went in, but not in the sundries account. It went in another column. I got up this form of manufacturing sheet for the U. S. Glue Co., but thought the rent column not necessary; they owned the factory.

Q. But in arriving at the cost of manufacture by the Diamond Glue Co. in its factory you considered rent as one of the items of cost?

A. I figured that we rented; yes, sir.

In our own manufacturing account we included manual labor. Perhaps part of the salaries of the manager were included, and I think part of my salary. I did not include insurance. We carried a regular insurance account, never added it to manufacturing. Lime and salt belong in sundries. I never did any glue-boiling. I said fleshings should be limed 10 or 12 days. We don't lime some fleshings at all, just work them right up a good many times. A good many manufacturers do the same. Perhaps if we have too much stock we leave them longer in the vat, but 10 or 12 days is sufficient.

We always figure from 5,500 to 7,000 for a vat. I don't weigh stock into the vats myself, but I have seen vat books and
103 know what the size 8 x 8 will hold.

If the trimmings are of heavy hides they should be limed 60 days and reworked between times. I went up there sometimes twice, sometimes three times, and sometimes only once a week until Mr. Morron told me we were stopped suddenly by letter.

Q. Letter from whom?

A. I understood that way. The contract was cancelled, as I understood. Mr. Harden took Mr. Morehead's place some time around the latter part of September or in October.

In my visits I found the vats were not taking care of the stock. They had an accumulation of too many trimmings and not enough fleshings. The first fleshings we put in were overlimed; we could not help it; it took so long to put up the factory. They are injured if overlimed. I had no personal interview with Mr. Vogel in regard to the horse fleshings. I had nothing to do with fixing the price at which they were taken.

I should judge you can, perhaps, get ten per cent. more gelatine out of the calf than hide trimmings. It is worth more than regular glue. The prices are from 15 to 35 to 40 cents a pound. These sheets do not give the gelatine yield. I know that there was gelatine produced, but I do not know how much. There is no column for that.

Redirect examination:

The Diamond Glue Company furnished Morehead and Harden at two times as superintendent for the U. S. Glue Co. When I was up to the factory to help bring out a good product the United States Glue Company did not ask me to do anything that I did not do, that I know of. They asked no service, to my knowledge, that I failed or refused to render.

104 The cost of making gelatine is, I should judge, 3, 4, or 5 cents more a pound than that of making glue. It is very thin in the first place, and you can only put a small quantity on a net. It costs more for handling—more all around. Instead of making, I would say, a thousand pounds of glue, you can, perhaps, make only 200 pounds of gelatine. Gelatine slices and glue is cut in chunks and afterwards run through a cutting machine, then they lay it out on nets, and what we call thin cutting is the thin slices which we make. Mr. Morehead is the originator of the machine that cut the glue. That machine was furnished the U. S. Glue Co. by the Diamond Glue Company, in whose employ Mr. Morehead originated the machine. It is the cutter referred to in the correspondence. Pretty nearly every large manufactory in the country has from one to four of the Morehead make of cutter. After the gelatine is taken off it makes the other glue a lower quality. Making gelatine is taking off the cream.

W. H. MOREHEAD, sworn as a witness on behalf of the plaintiff, testified as follows:

I am 47 years old. I reside in Chicago. I am superintendent of the Diamond Glue Company's factories. I have been engaged in glue manufacturing since 1882, I think. I have had considerable experience in that time and regard myself as a practical glue man. I have had charge of several different factories. I started in Cincinnati in 1882 as engineer in the factory of Layton & Cline. I took charge of the engine for six or eight months, and from there I went into the boiling department. I think in three or four months after that I had charge of the boiling department and continued with them until they sold out to the Bader Glue Co., I think, in
105 1884 or '5. The boiling department is the glue-making part. From there I went down to Madison, Indiana, to take charge of a small factory there. A party by the name of Layton started in business there and ran it for four months. I was superintendent. He sold out to J. Spiegel & Co., of Cincinnati. I had charge of the factory until 1894 or '5. From there I came to Chicago and took charge of the factory for the Diamond Glue Co.—the Canal Street factory. I had charge of that factory for a couple of years. From there I went to Kansas City and had charge of the S. & S. glue factory, I think, from the 1st of January, 1898, until about the 1st of July, 1898. I then came to Chicago and was asked by Mr. Freshman to draw sketches or a rough plan of the factory which was to be put up in Milwaukee—a factory to take care of about 30,000,000 pounds of glue stock per year. I made some sketches, and was probably at work at that for a week. Mr. Freshman, Mr. Morron, and I came to Milwaukee and brought these sketches with us. We met Mr. Vogel at the Pfister hotel, and we was going out to look up a site to put this factory on. There was one at North Milwaukee and one at South Milwaukee. We went first to North Milwaukee. Mr. Vogel didn't go there with us, but took us down to the Northwestern depot, and there we met Mr. Albert Trostel. He went with us to North Milwaukee. We looked the grounds over, didn't think they were very favorable, and decided to go down and look at the site at South Milwaukee. In the afternoon of that day we went down to South Milwaukee, Mr. Fred Vogel going with us, and I think it was while going out there that he looked at the sketches we had made. We also looked them over after we got on the ground and talked the matter over whether we could put
106 buildings of them dimensions and put up in that manner on the grounds we had there. I remember very distinctly that Mr. Vogel said in my presence that he understood that these plans were to turn out three million pounds of dry glue, and he would like to have them large enough for an increase of about 25 per cent. without adding to the buildings in case the business should increase. That was either out on the grounds or talked over in the street car. That must have been somewhere — the 12th or 15th of July. I don't remember whether I left the sketches in Milwaukee or brought them back with me. That evening Mr. Trostel brought Mr. Finkler down to the Pfister hotel and introduced him to me, saying he

would be the architect to do the work on that building. The next day I went back to Chicago.

Some two or three days after I went back to Chicago Mr. Finkler and Mr. Bossert came down to look over our old plant at Robinson and Canal St. They wanted to become familiar with driers, vat and wash-mills, glue kettles, and everything pertaining to a factory. Mr. Bossert was mechanical engineer for the Pfister & Vogel Leather Co. Mr. Finkler, Mr. Bossert, and I went out and looked the factory over. Probably Mr. Freshman was along. I don't remember. I am not positive whether my sketches were there then, but I think they were, because there were some alterations made while Finkler and Bossert were there. They were made between us. I think the main buildings were left about as they were, but some little change made in the power-house; just what, I don't remember. It didn't amount to very much.

The sketches prepared designed a factory to take care of 30,000,000 pounds of glue stock, about ⅓ trimmings and ⅔ fleshings. I
107 had originally laid out, I think, 400 or 400 and some odd vats. I asked for 1,500-horse power. I didn't get the amount I thought we would need to do the work. I asked it from Mr. Bossert when we talked the matter over. I met Mr. Vogel, I think, on my second trip to Milwaukee. He was on his way out to the tannery. He took me out and introduced me to Mr. Bossert as his mechanical engineer and told me he would look after the machinery and what was needed. I was to talk matters over with him and tell him what I wanted and make suggestions and work the matters out between us. It was shortly after this I told Mr. Bossert this factory should have 1,500-horse power. I think the power was about one of the first things we got down to. I saw the plans and specifications prepared by Finkler afterwards. Mr. Bossert made the drawings and blue prints of the power-house, if I am not mistaken. It provided for 1,050-horse power—three batteries of 350 each. He said it was all that would be required to take charge of what machinery and work we had to do.

The original sketch I made provided for 400 vats. I think the plans were drawn on the same lines. 308 were put into the plant, if I remember rightly. I think they were reduced to 308 about the 1st of October. The matter came up about the time the bids were opened. It seems the figures ran considerably higher for the putting up of this building then had been expected. Mr. Vogel said so. Mr. Vogel and some other parties met there—the stockholders, I believe—on that day and wanted to know if it was not possible to cut down the cost of the building in some way. They asked Mr. Finkler, the architect, to see what changes he could make in the construction to lower the cost—asked Mr. Bossert what he could do in the
108 way of cutting out machinery or making changes in the plant as he had it then laid out; also asked me how much I could cut out. Mr. Finkler made some changes; Mr. Bossert, I think, made some, and I left out some kettles; I don't remember how many. A section of vats was left out. The tanners, after the blue prints were finished, thought the cost entirely too great. It was talked

over between them in my presence. I told them I could not take care of that large stock with a smaller factory. Mr. Vogel then suggested they would all look up their last year's shipments and see what their output had been for the year previous to this. They found they had produced between 17 and 18 million pounds. I told Mr. Vogel if I had known that and drawn my plans to take care of that much glue stock the factory would have cost less money. The stockholders then looked the plans over and decided to leave the walls and size of the buildings as they were, making what changes they could in the construction and appliances to cut down the cost to take care of what glue stock they had—between 17 and 18 million pounds. The number of vats as reduced I considered ample to take care of that stock per year.

The building was a very fine one, put up very substantially with brick and iron, heavy foundations under it, that would stand there for years. It was an expensive building. While these plans were drawn up I was with Mr. Finkler, the architect, and made suggestions to him as he went along with the work. Some changes were made, and others he would not make. About all the orders I received were from Mr. Vogel to get the factory going as soon as possible. He was president of the U. S. Glue Company and was on the grounds, I think, more than any of the other stockholders.

109 I was with the U. S. Glue Co. from about the first of August, 1898, until, I think, September 1, 1899. I received my wages during that time from the U. S. Glue Co. I did not receive any compensation from any one else. I was superintendent of this factory up to September 1, 1899. Mr. Harden was superintendent after that. We were delayed in the construction of the plant very much in the early fall by bad weather. There was a good deal of rain, and the ground is in a terrible condition out there. Whenever it would rain the ground got like putty. You could not get through. It delayed us with the foundations. After they were in we were delayed a good deal by cold weather. It was too cold for bricklayers to work, and there was a good deal of time lost in that way. We were delayed considerably by machinery coming in slow, and one thing and another which we needed at times we would have to wait for. It was very hard to get labor there. It was almost impossible to get men enough to run the plant. After we had it in operation we didn't have men enough to run it at times. Nothing that was to be received from the Diamond Glue Company delayed the construction of the plant, that I know of. I was there during all the time of the construction. The plant was ready for operation about the latter part of July. I cannot just recall the day on which we started. One thing we had to contend against in starting was hot weather. The factory was started in the hottest part of the summer, you might say, and, on the other hand, we had glue stock which was overlimed and in bad condition to work with at that season of the year. It is hard to destroy the lime; got to wash the stock and dry it and treat it with acid, and in the end it is a weak glue, with not the strength and elasticity of a glue not

limed too much. I had to evaporate that glue very heavy to
110 hold it; keep it from melting after it was laid out. The accumulation of stock was such that there was no place to put it. It began to come in after the first of the year 1899, and the factory was not in shape to receive it. The various tanners claimed they had no place for the stock, and must ship it to the factory. I took it in as best I could and put it in piles until we got some vats finished, which, I think, was some time in February. I am not sure of the time. I got one section of 77 vats in, and as the stock came in at that time—fleshings—I immediately put them into the vats and kept them there, filling the vats as we got them in. We had to watch the stock, take care of it, handle some of it, add more lime to it.

When we began operations we had an accumulation of six months in trimmings and five months of fleshings; that was in our way to a certain extent. The cost was considerable. It was handling that stock once more, and the most of it we had to cart from one building and another to the building in which our washers were to take care of it; kept quite a force of men busy.

Hide stock is from cattle. Bone stock makes a distinct kind of glue. Hide stock does not include goat, sheep, or horse trimmings.

It costs considerable more to manufacture glue in hot weather, because in the heat and humidity of the air the glue won't dry. You can't load your tunnels or dryers so full, because the air blown over the glue is so loaded with moisture. Before it is put in the dryer it picks up every little moisture and the glue dries very slowly. There is an extra expense in cooling. We have to haul in a supply of ice or put in an ice machine and put it in a refrigerator. In the beginning of the operation we were short of power.

111 One of the letters speaks of difficulty in the evaporator. The machine carried glue over the pump and it was lost in the water that passed through the pump, which passed through the condensor. I don't know who ordered the machine. My judgment was that the machine was too small—that is, the chamber was too small for the amount of heating surface it had in it. When the steam was turned in and glue began to boil it boiled up high near the opening in the roof, where the vapors were drawn off by the pump and considerable of the glue was drawn off with the vapors. I could not say positively whether change would have corrected the errors. I think it would. I have seen one of their machines modified and we had no trouble. The Diamond Glue Co. had nothing to do with the defect in this machine as originally produced.

The factory shut down after it began. About the latter part of August, I think it was, we got behind with the stock which should be prepared for the manufacture of glue; hide trimmings, for instance. We were running altogether on fleshings and we had no hide trimmings prepared except some few vats which came in in limed condition from some parties. It was impossible to get help, too, to prepare stock every day for the kettles and for the day's work and get the assorted trimmings we had piled up in various places over into the factory and washed up and vatted and limed. I pro-

posed to Mr. Vogel we would shut down the factory for ten days or a couple of weeks and put the entire force on separating the stock and get as much of it in vats as possible, and he thought it was the right thing to do. I shut down the factory about the latter part of August, and I don't think it had started by the first of September, when I left there.

112 In regard to the difficulty in getting workmen, we were about a mile and a half or two miles from South Milwaukee, which is the nearest town, and we could draw very little help from there, as most everybody who lived there was employed there. We had a few men from South Milwaukee and got some from the surrounding country. We tried to get men in Chicago, but they would not stay; seemed to be *be* dissatisfied. Some would stay half a day, some all day, some two or three days; some would wait until pay day and then quit. The U. S. Glue Co. had fifteen houses built at Carrolville and there were two boarding-houses or saloons there and there were some farm-houses around. There was one store. The houses were to get men to move there with their families, and perhaps some would take boarders, and in that way we could hold some.

As to whether the delays were unusual, there is always more or less trouble in hot weather in running a glue factory. It would be much harder to start a new plant than to go ahead with an old one, because in an old plant you have everything in running gear; you have your help educated to what they have got to do; every man knows his business and has to perform it. In a new plant like the one at Carrolville we started in bad weather, to begin with, with overlimed glue stock, shortage of help; what help we had was mostly green and had to be educated; shortage of power and other troubles came up which were unexpected, adjusting machinery and one thing and another. The amount of horse fleshings mixed with the other stock made the glue of a sufficiently lower grade to be noticeable.

113 Cross-examination:

I did not hear any talk about building a glue factory of five million pounds capacity. I do not think the question of glue stock was ever talked over very much with either Mr. Finkler or Mr. Bossert. They spoke of the capacity of the factory by product or by stock. Mr. Vogel expected the factory to turn out three million pounds of dried glue, and he also wanted the buildings large enough for an increase of 25 per cent. without adding to them. He said somewhere in the neighborhood of 25 million pounds of that grade of stock would turn out about three million pounds of glue. The stock in good condition yielded on an average 13 or 12½ per cent. The idea was to cut the apparatus, machinery, and plans down to a capacity for 17 or 18 million of stock. The buildings were left according to the original plan. I cannot recollect the exact conversation we had in regard to changing the boiler capacity. I do not think he made any changes in the boiler capacity. He had arranged for two more boilers, I think, in his drawings for the boiler-house.

He put in three and also put in foundations, I think, for two more, which were to be put in later if we needed them, but he claimed the three boilers were sufficient to do this work. I told him it was not sufficient boiler power; stuck to that argument from the start of the factory that we would be short of boiler power.

I had had several years' experience in running a hide and calf glue factory before this with different factories. I had run a hide and calf glue factory through the summer months at Madison, Indiana, I think, in the year 1894 or 1895. That factory may have closed down on some days, but we figured on running. We had ice there for cooling our jellies.

114 Fleshings make an inferior glue if overlimed. The yield is not as large and the glue has not the strength; some grease is lost in overliming. Horse fleshings make an inferior quality of glue. I think they came mostly from Pfister & Vogel. They were often mixed in with the other fleshings. They were weighed up separately, I think, when they came in; if they were not divided, they were weighed up as cattle fleshings; 10 or 12 days is what we figure on liming fleshings. I don't know whether any of the fleshings were limed from February until the last of July. I took the first that came in, as soon as the weather would permit, out and dried them; took them out of the vats and spread them. We also put in a platform for dried stock. Mr. Freshman came up frequently. I don't think any directions were given me in regard to the conduct of the manufactory; left entirely to use my own judgment in the running of that plant so far as making the glue was concerned, and we would talk matters over in a general way.

Redirect examination:

I said, I believe, that stock would yield about 13 per cent., take it as it came from the tanners. After it had accumulated and taking it in the condition it was when I saw it the fleshings would not yield that; I could not say how much less, but I think in the neighborhood of 2 per cent. There is a decrease, because the gelatine is destroyed by overliming. There is some loss in the drying and in the washing. The average production of grease would be about 8 per cent., I think, on fleshings. On this stock the grease would be computed at 8 % on ¾ of the total hide stock, if it were averaged. The yield of grease in these accumulated fleshings was less, but I cannot tell how much less. I had charge of the factory only

115 a short time after it was started. It was less than the average because of the overliming which destroyed the grease.

Glue stock comes in a good many different sized barrels and packages. A salt barrel will weigh, I think, in the neighborhood of 200 pounds; a sugar barrel will probably weigh 300; depends considerably on the condition of the stock. It ranges between a minimum of 200 and a maximum of 300. These fleshings were limed more than the usual time, because it was the only thing we could do with them. They accumulated there and we had to take care of them the best way we could. If we had not put them in the

vats, there would have been considerable loss. If the stock were piled up in large piles, it would be apt to heat, burn, and decompose. You open up a pile and you will find a cavity in it; you will be apt to find it mushy and totally destroyed. We could not have done any better than we did, with this stock piling in from the tanneries and our factory incomplete.

Recross-examination:

If the stock had been sold, that would have been a different thing. Under the conditions in which I was working I had to take care of the stock. The fleshings could not have been treated at once, because winter months' fleshings won't dry.

ARNOLD FRESHMAN, recalled as a witness on behalf of the plaintiff, testified as follows:

In regard to the manufacturing sheets, I did not mean to be understood as saying that we had a column headed rent. I said we had a column where we put in the rent of the Chicago factory and also part of my salary. The $25 I referred to consisted of part of
116 my salary and the rent. I think the rent was about $8 a day. That was the actual rent the factory had to pay. I dictated and signed this letter dated January 12, 1899, to Mr. Fred Vogel, president of the U. S. Glue Company, and caused it to be sent.

Letter offered and received in evidence, marked Ex. 7*a*.

The statements as to prices in the fore part of this letter are true.

I wrote and sent this letter dated March 23, 1899, to the United States Glue Co.

Letter offered in evidence and marked Ex. 9*a*.

These statements in regard to hide trimmings were true.

I wrote and sent to the U. S. Glue Co. this letter dated November 16, 1899.

Letter offered in evidence and marked Exhibit 26*a*.

The pencil memorandum on the letter is in Mr. Vogel's handwriting.

Pencil memorandum offered in evidence as follows: "Accept order."

The copy of letter shown me is a true copy of a letter written and sent by me to the U. S. Glue Co. November 27, 1899.

Copy of letter offered in evidence, marked Ex. 32*a*.

I know something of the so-called Gallun stock that has been mentioned. I did not have any knowledge as to its purchase by the U. S. Glue Co. The matter was talked over, I think, at a meeting I attended at the Pfister hotel, whether it would be advisable to buy that stock which was offered them, and during that conver-
117 sation I suggested they find out what they could buy it for, and the next time I came up the stock was bought; I never knew at what figure. I had charge of all matter of purchase of stock so far as I was consulted. The only consultation with me is the one stated and the only connection the Diamond Glue Company had with it.

My statement yesterday of the market value of this glue stock was based on contracts which the Diamond Glue Company had with other tenants covering similar stock. Besides these the Diamond Glue Co. had made, I am acquainted with the so-called New Jersey and Newark glue stock. The Newark fleshings I considered worth considerably more than the Milwaukee fleshings. The hides are fleshed at first for grease and afterwards scoured, and that is the best stock for making glue. I have seen gelatine made out of it. I think the market for the same quality of glue stock in the region of the East, Newark and New Jersey, and the same quality of glue stock in this region in 1898 was about the same. I think there were no scivings in such materials furnished to the U. S. Glue Co. during 1899, prior to December 1, with the exception of a small quantity made by Pfister & Vogel they called scivings. It was a trifling amount, and I think there was no price set on it. Scivings and shavings are about the same thing.

I was acquainted with the contract J. Speigel & Co. had with Eisenbrod & Co. in 1899. The Eisenbrod tanneries were located in Chicago. I should think they produced during the year ending April 30, 1899, to exceed 3,000,000 pounds per year. The glue stock at those factories consisted of calf trimmings, calf fleshings, and horse trimmings, horse fleshings, horse butts, and, I think,
118 some hide trimmings—a very little, if any. There was no difference in the market prices of glue stock of this character in April and succeeding months of 1898 and of the same period of 1899. I don't think there was any difference in value in the other half of 1899 as compared with the first half of glue stock of these grades we have mentioned. The contract of Spiegel & Co. with Eisenbrod & Co. here produced is the basis of my opinion of the market value of this glue stock.

Contract offered in evidence. Objected to as incompetent to prove price and because it is a contract dated April 21, 1898, commencing May 1st, 1898, and ending April 30, 1899. Objection sustained. Exception by plaintiff.

Contract marked "Exhibit 44 for identification."

Cross-examination:

I do not remember that the Diamond Glue Company agreed to take six car-loads of fleshings from the U. S. Glue Co. per week at any time. They did take some to accommodate them for a whole month, I think. Those fleshings were shipped to the Diamond Glue Co. factory at 30 Canal St., Chicago. The Northwestern Fertilizer Company was operating that factory at that time. I don't know at what rate these fleshings were put into the N. W. Fertilizer Co. The Diamond Glue Co. didn't put them in. The Diamond Glue Co. turned them over to the J. Spiegel Co. I don't know how much the J. Spiegel Co. got from the N. W. Fertilizer Co. for those fleshings. I don't know whether they were the exact fleshings.

I know the tannery of N. R. Allen & Sons, Kenosha. I know they had a contract either with Armour or Swift for the year 1899. I

don't know what figure they got for their fleshings that year. I know Remnitz Leather Co. The Diamond Glue Co. bought stock of them, I think, in 1898. *The* J. Speigel & Co. did not buy
119 any fleshings from Remnitz & Co. in 1899 that I know of.

Redirect examination:

The Spiegel Company Chicago warehouse was at the Diamond Glue Co. factory—that is, they have a factory right on their property. They had no machinery at that time. All they had was a warehouse and liming tubs and one thing and another. Mr. Spiegel attended to the stock they bought and handled; dried stock and part he sold green; made different mixtures. I am acquainted with the character of the Allen stock just referred to. It was high-grade stock. It is a high-yielding stock, both in grease and glue. I would consider that stock worth 50 per cent. more than the stock furnished the U. S. Glue Co. We had the Allen plant glue stock years ago, and I was acquainted with the character of it. I don't know much about the Martin plant stock. I think there was a short time we had a contract which we assumed from our predecessor. After we bought the factory we received the product under this prior contract, but I don't know for how long a time. I think the Remnitz Leather Co. makes at the rate of five or six cars a month, both fleshings and trimmings taken together. I do not know the character of their product in 1899. We had it in 1898.

Recross-examination:

It must have been ten or 12 years ago that we were getting the Allen stock. I have not seen the stock since, but a practical man that was getting that stock told me it was worth 50 per cent. more than the Milwaukee stock.

Redirect examination:

I knew of the Allen stock on the market, aside from personal inspection of it. I know the method of their factory. The
120 difference in their stock is caused by the difference in their manner of fleshing. I understand the Allen stock is the same now as when we handled it. Among glue-makers the stocks of different glue-makers have a market rate where they manufacture by the two methods (hand fleshing and machine fleshing). Things are talked over in an offhand way and stocks are talked of—the stock this man makes, the stock the other man makes—and my information in regard to the Allen stock is based upon my personal acquaintance with it 10 or 12 years ago, and the present standing of that stock with the trade, and the method which is used there in its production.

Recross-examination:

I think I was informed that the Allens took off their fleshings by hand, by Mr. Allen himself. All I know about it is what I have heard from Mr. Allen or somebody else.

Motion to strike out testimony of witness in relation to the Allen stock as being hand-made. Motion granted. Exception by plaintiff.

FRED BASSINGER, sworn as a witness on behalf of the plaintiff, testified as follows:

I live in Chicago, am 36 years of age, and am cashier and book-keeper for the Diamond Glue Co. I have had 20 years' experience as book-keeper. I was with the Armour Company 15 years, principally in the glue department. I had a little over two years' experience on the board of trade with Pake & Lines as book-keeper. I have been with the Diamond Glue Company about three years. With Armour & Co. I had charge of the entire book-keeping. I
121 did not keep the cost of production. I simply kept the total cost of the material produced and the general books of the glue department. With the Diamond Glue Company I kept all the books they had. In their different factories I have had charge in a general way of the manufacturing accounts and books. I know The U. S. Glue Co., the defendant in this case. I was sent by the Diamond Glue Co. to render assistance to the U. S. Glue Co. I think it was the last of September, 1899, I went to their factory, at the request of Mr. Freshman, who was there the day before. That was their factory at Carrolville. I saw Mr. Hanson, the book-keeper, and Mr. Harden, the superintendent. When I first got there I went into the office and introduced myself to Mr. Hanson and talked in a general way for a few minutes, and then we went out and met Mr. Harden and went around the factory and looked the place over. We went around in different departments, and he explained the workings of the place and what an improvement it was over some old places I had seen. I went with Mr. Hanson to the office, and he showed me his books. I made some little suggestions about changing his system so it would conform with our ideas of getting the reports of the shipments. One of them was about keeping his operating expenses separate, and one was about keeping the discounts separate. I took up a lot of forms that we used in our business to give him an idea what he should do in order to get proper results. I wanted to give him the benefit of our experience. I think he adopted all the suggestions I proposed to him as to the forms, etc., but he did not seem to like the idea of changing his books; said he might not be allowed to do it, anyway; while my idea might be a better one than they were practicing, he could not change because Mr. Vogel was the boss and he wanted them
kept his way. I furnished all the benefits that my experience
122 as a book-keeper in the glue business enabled me to furnish.

I have seen the fifteen manufacturing sheets furnished the Diamond Glue Company, now handed me, marked Exhibit 42. We mentioned in our conversation these sheets and the items in them. Mr. Hanson explained to me the way he arrived at the cost of production, just the same as it is on these sheets, stating what the different items were, how they arrived at the price of coal and labor and sundry items and material. I have gone over those man-

ufacturing sheets to make a tabulation of them all as they are there I have also made a tabulation based upon those manufacturing sheets, eliminating from sundries the $100 a day and the item of grease. I made the tabulation shown me from the original sheets received. The first column is a copy of the exact figures rendered by the U. S. Glue Co. in Exhibit 42, tabulated. The second set of columns is the same as the first, eliminating $100 a day and also deducting for grease that was produced from the stock. The third set of columns is taking their figures for the amount of glue stock used and figuring the glue stock at prevailing market prices—that is, at certain assumed prices, which are stated there—eliminating the $100 a day. That tabulation is an accurate statement of results, taking the facts as stated and based on Exhibit 42.

Tabulation offered in evidence as the testimony of the witness of his tabulations on the basis stated, marked Exhibit 45.

In each one of the three columns of the tabulation the figures represent pounds of glue. Under expense the figures represent cost of production—that is, dollars. Under cost, that is cents per pound. The figures stated under the item "less grease shipped" are dollars. The figure which is used as the amount of grease shipped is correct, based upon the shipments that went from the factory,
123 reported by the U. S. Glue Co. to the Diamond Glue Co. The figures under "cost" represent the reduction which should be made per pound against the cost of glue for the yield of grease. It is simply the figure for grease divided by the yield.

Plaintiff offers in evidence the deposition of Lester Doctor, taken before Florence Rosensteel, notary public in and for the county of New York, borough of Manhattan, State of New York, on the 23rd day of February, 1901, at the office of Charles A. Hess, No. 66 Broadway, as follows:

LESTER DOCTOR, a witness produced, sworn, and examined on behalf of the plaintiff, bein duly sworn, deposes and says as follows:

Q. What is your full name, age, and residence?

A. My full name is Lester Doctor. I reside at the Gilsey house, New York city, and my age is 34 years.

Q. What business were you employed and engaged in in the years 1899 and 1900 and with whom?

A. I was engaged and employed in the glue-stock business by the United Tanners' Glue Company, a corporation organized under the laws of the State of New Jersey, and doing business in that State, in the State of New York, and elsewhere in the United States, as bookkeeper, cashier, and assistant to the treasurer.

Q. What was the nature of the business of the United Tanners' Glue Company?

A. Engaged in the business of buying and selling glue stock used in the manufacture of glue from various tanners in the States of New York, New Jersey, and Massachusetts.

Q. Do you know what the aggregate amount of glue stock
124 was so purchased in any one year from the various tanners?

A. It aggregated, to the best of my knowledge and belief, 25,000,000 pounds per annum.

Q. Please describe the various kinds of glue stock purchased by and delivered to the United Tanners' Glue Company.

A. Pates, fleshings, shanks, calf trimmings, limed and salted, calf fleshings, goat trimmings, and goat fleshings.

Q. Are you familiar with the prices paid for the various kinds of glue stock purchased and delivered to the United Tanners' Glue Company? If so, please state what those prices were.

A. Green salted pates, $1.20 per hundred pounds; green limed, mixed fleshings and shanks, 60 cents per bushel; green salted and green limed calf trimmings, $1.50 per hundred pounds; green limed calf fleshings, 18 cents per hundred pounds; goat trimmings, 70 cents per barrel, and goat fleshings, 14 cents per barrel.

Q. During the time that you were employed with the United Tanners' Glue Company did the said company have any outstanding contracts for the purchase and delivery of glue stock?

Defendant objects to this question and the one preceding it; that the testimony called for is irrelevant and immaterial. It appears that this is a concern purchasing for the purpose of selling in the market, and that the price which is fixed by this witness and by the contracts, presumably, to which he is about to testify, are prices which are paid, not by manufacturers in the open market—manufacturers of glue—but by dealers in such stock for the purpose of resale for profit, and those prices are not the proper basis upon which to fix the market value as furnished to manufacturers.

Objection overruled. Defendant excepts.

125 A. Yes, sir.

Q. As cashier, book-keeper, and assistant to the treasurer, were you familiar with and did you have knowledge of contracts which the said United Tanners' Glue Company had with tanners and others for the delivery to and purchase by it of glue stock?

A. Yes, sir.

Q. Did the United Tanners' Glue Company have contracts for the purchase of glue stock with the tanners? If so, about how many, their duration, date, and amount of glue stock involved?

A. With the exception of two or three dealers and tanners the United Tanners' Glue Company had about 25 contracts for the purchase and delivery to it of glue stock, very nearly all of them being made about January 1st, 1899, and involved a delivery and purchase estimated at something like 30,000,000 pounds per year. Very nearly all these contracts were for a period of ten years from about January 1st, 1899.

Q. Were you familiar with the prices paid for glue stock to the various tanners with whom the United Tanners' Glue Company had contracts prior to the making of the contracts specified by you?

A. Yes, sir.

Q. What were those prices?

COURT: That is a question of what was paid by the United Tanners. Do you claim that to be admissible for establishing a market price? I think the objection will have to be sustained. My supposition was that he was to testify to values in the market and not to those fixed by this particular company.

Mr. BANCROFT: This question now relates to prices at a time prior to 1898 and prior to the contracts.

126 Mr. LINES: The whole testimony in that deposition relates to the prices paid by the United Tanners' Glue Company.

COURT: If that was the question, I should want to hear you on its admissibility.

Mr. BANCROFT: The question which I was reading referred to prices paid for glue stock prior to 1899. The witness is testifying to the prices paid for a large quantity of glue stock in that territory during the period in question.

COURT: That is not admissible. Individual circumstances, however large, are not admissible to prove the market value. The objection is sustained to any answer to the individual transactions of the glue company.

Exception by plaintiff.

Mr. BANCROFT: The objection is sustained to all questions in relation to values?

COURT: That is, to all questions relating to prices paid or contracts made by that company which he represented.

Exception by plaintiff.

CHRISTIAN ANSTEDT, JR., sworn as a witness on behalf of the plaintiff, testified as follows:

It is stipulated by counsel for defendant that the authorized capital stock in June, 1898, was $300,000; that on the 7th of June, 1898, $283,000 of that stock had been subscribed.

WITNESS: I keep the record book of the company. It appears on pages 6 and 7 of the record book that there were subscriptions made to the capital stock of the U. S. Glue Company on the 7th of June aggregating $283,000, of which amount Fred Vogel, Jr.,

127 trustee, subscribed to $100,000. The certificate for that subscription was not issued to Mr. Vogel until some time afterwards. No certificate of stock was issued to Edward Zohrlaut on his subscription of $50,000 or to William Becker, $50,000, until later on. It appears by the record book that nothing had been paid in on the subscriptions on the 25th day of June, 1898.

Cross-examination:

On the 25th of June, 1898, we had not commenced operations; hadn't no more than just organized. Those sums were paid in for the purchase of real estate and the erection of buildings.

Redirect examination:

Q. How much of those subscriptions, can you tell, were paid for by money, and how much by glue stock furnished by the stockholders?

Objected to as immaterial. Objection sustained. Exception by plaintiff.

—. I cannot tell without looking at the books what the plant constructed as Carrolville cost prior to January 1, 1900. I should think the total cost of the plant, everything that the U. S. Glue Company owned there at the time it commenced operation in July, 1899, close on to $250,000, $225,000, somewhere along there. I do not know what proportion of that was paid for the store and dwelling-houses constructed there, but I included everything we own, the land and everything.

Recross-examination:

Those figures had been reached just about July, 1899, with the exception that the price may be a little higher. During 1899 there were some improvements made out there. I got my figures from trial balances that we had.

Plaintiff rests.

128–132 EXHIBIT 1.

STATE OF ILLINOIS, } ss:
Cook County, }

To William H. Henrichsen, secretary of state:

We, the undersigned, Jonas Spiegel, John R. Morron, and Arnold Freshman, propose to form a corporation under an act of the General Assembly of the State of Illinois entitled "An act concerning corporations," approved April 18, 1872, and all acts amendatory thereof, and for the purpose of such organization we hereby state as follows, to wit:

1. The name of such corporation is "Diamond Glue Company."
2. The object for which it is formed is for the manufacture, purchase, and sale of glue, fertilizer, and by-products, and the general dealing in such products and materials.
3. The capital stock shall be one hundred and fifty thousand dollars.
4. The number of shares is fifteen hundred.
5. The amount of each share — one hundred dollars.
6. The location of the principal office is in Chicago, in the county of Cook, State of Illinois.
7. The duration of the corporation shall be twenty-five (25) years.

JONAS SPIEGEL.
JOHN R. MORRON.
ARNOLD FRESHMAN.

* * * * * * *

133 & 134

STATE OF ILLINOIS,
DEPARTMENT OF STATE.

William H. Hinrichsen, secretary of state, to all to whom these presents shall come, Greeting:

Whereas a statement, duly signed and acknowledged, has been filed in the office of the secretary of state on the 25th day of January, A. D. 1894, for the organization of the Diamond Glue Company, under and in accordance with the provisions of "An act concerning corporations," approved April 18, 1872, and in force July 1, 1872, and all acts amendatory thereof, a copy of which statement is hereunto attached;

And whereas a license having been issued to Jonas Spiegel, John R. Morron, and Arnold Freshman as commissioners to open books for subscription to the capital stock of said company;

And whereas the said commissioners have, on the 7th day of February, A. D. 1894, filed in the office of the secretary of state a report of their proceedings under the said license, a copy of which report is hereunto attached:

Now, therefore, I, William H. Hinrichsen, secretary of state of the State of Illinois, by virtue of the powers vested in me by law do hereby certify that the said Diamond Glue Company is a legally organized corporation under the laws of this State.

In testimony whereof I hereto set my hand and cause to be affixed the great seal of State. Done at the city of Springfield this [SEAL.] 7th day of February, A. D. 1894, and of the Independence of the United States the one hundred and eighteenth.

W. H. HINRICHSEN,
Secretary of State.

* * * * * * *

135

EXHIBIT 2.

Letter-head.

MILWAUKEE, WIS., 6, 22, '98.

Diamond Glue Works, Chicago, Ill.

GENTLEMEN: The writer has been asked by the directors of the United States Glue Co. to forward the inclosed proposition to you, setting forth the conditions upon which the U. S. Glue Co. is ready to enter into business relations with you. It contains only the salient points of such a contract under which we would tie ourselves to you, leaving the minor points to be dwelt upon in a contract to be drawn up later. Knowing as you do that we are novices in the glue business, you will agree with us that it would be a material aid to us in drawing up a contract if you give us an insight into the contracts you have with Foerderer and others with reference to the running of their glue factories, which favor you will do doubt grant us.

Awaiting your early reply, we are very truly yours,

(Signed) UNITED STATES GLUE COMPANY,
Per ALBERT O. TROSTEL, *V. Pres't.*

136 (*Proposition Referred to in Foregoing Letter.*)

You are to plan (subject to our approval) and oversee and supervise the erection, equipment, and completion of the glue factory on the site to be selected by us, we to employ an architect whose plans are to be adapted to your suggestions. These plans are to include all economy of space and process gained by the practical experience you have had in building and operating your three plants, and we are also to have a perpetual right to all your labor-saving devices and all knowledge used or acquired by you in the process of the manufacture of glue.

After the factory is completed you are to operate the same for us, and by your officers personally oversee and supervise the manufacture of the product, and so obviate the necessity and the expense of any skilled or high-priced help, with the sole exception of a superintendent, whom you are to secure for us, and whose salary shall not be over $150.00 per month, you to keep us supplied with such capable superintendent at all times during the life of this contract.

You are also to handle and sell the entire output of the factory, but all such product is to be billed and sold as the product of the United States Glue Company.

During the life of the agreement, beginning as soon as our factory is ready for operation, you are to refrain from making or handling either hide or calf glue.

You are to guarantee payment of all accounts for sales made by or through you.

You are to receive a commission of 10 % on all sales of glue.

137 From the earnings of the works a net profit of 10 % on the stock is to be first set aside for our stockholders, then you are to receive 10 % of the excess of net profits over and above this amount, but in ascertaining profits 10 % of the cost of the plant shall be charged off each year for depreciation.

It is understood and agreed that the raw material sold to our company by or for its stockholders is to be sold and purchased at fair market prices for the respective grades.

The contract to cover a period of five years from the completion and commencement of the operation of the plant.

138 EXHIBIT 3*a*.

This agreement entered into this twenty-fifth day of June 1898, by and between the United States Glue Company, a corporation organized under the laws of Wisconsin, and having its home office in the city of Milwaukee, State of Wisconsin, party of the first part, and Diamond Glue Company, a corporation organized under the laws of Illinois, and having its home office in the city of Chicago, State of Illinois, party of the second part, witnesseth :

For and in consideration of the agreements hereinafter contained, the party of the first part agrees to erect, equip and complete a

glue factory on the site to be selected hereafter by party of the first part.

Party of the second part agrees to advise with, and plan with the architect of party of the first part, and to oversee and supervise the plans of said factory, and to secure such economy of space and processes as may be gained from the practical experience the party of the second part has had in the operating of three glue factories; and party of the second part further agrees to give party of the first part the benefit of all its labor-saving devices, and the benefit of its knowledge and experience used or acquired by it in the manufacture of glue.

It is agreed that the site shall be selected by party of the first part within sixty days from the signing of this contract, and that the factory shall be begun and completed with the least possible delay after the site is selected.

It is further agreed that party of the second part shall have the management of the manufacturing in said factory, and shall operate the same for party of the first part and furnish a superin-
139 tendent whose salary shall not exceed $150.00 per month to party of the first part, and that party of the second part, by its officers, shall give said factory such personal supervision as may be necessary from time to time in the operation of the same, and said officers will give party of the first part in the management and operation of said factory the benefit at all times during the life of this contract, of the experience and knowledge of said officers and their company.

Party of the second part agrees to keep said factory supplied with a capable superintendent at all times during the life of this contract, whose salary shall not exceed the amount hereinbefore stated.

It is further agreed that party of the second part shall control, handle and sell the entire output, including glue and by-products of said factory, and all such products shall be billed and sold as the product of the United States Glue Company, but it is agreed that all invoices shall be stamped—"Diamond Glue Company, exclusive sale agents."

During the life of this agreement, beginning as soon as said factory is in operation, party of the second part is to refrain from manufacturing either hide or calf glue at any of their factories. Party of the second part guarantees the payment of all accounts for sales made by or through it.

It is further agreed that party of the second part shall receive a commission of ten per cent. on all sales of glue or by-products; thereupon ten per cent. of the cost of the plant shall be charged off each year for depreciation; of the net profits remaining ten
140 per cent. upon the present capital stock shall be set aside for the stockholders; thereupon party of the second part shall receive ten per cent. of the excess of net profits over and above the ten per cent. dividend.

It is understood and agreed that the raw material sold to the United States Glue Company by or for its stockholders is to be sold

to and purchased by said glue company at the fair market price for the respective grades.

This contract is to cover a period of five (5) years from the completion and commencement of the operation of the plant.

(Signed) UNITED STATES GLUE COMPANY,
By FRED VOGEL, JR., *President.*
C. ANSTEDT, JR., *Secretary.*

DIAMOND GLUE COMPANY.
J. R. MORRON,
[SEAL.] *Vice-President.*

141 EXHIBIT 3*b*.

Diamond Glue Company letter-head.

6, 27, 1898.

United States Glue Co., Milwaukee, Wis.

GENTLEMEN: Confirming our verbal understanding of the amendment to the agreement signed by the Diamond Glue Company and the United States Glue Company on the 25th inst., we herewith make it a part of agreement above mentioned. In addition to the ten per cent. excess profits that the Diamond Glue Company is to have, it is further agreed and understood that on all excess over and above $25,000 the Diamond Glue Company shall have twenty per cent. of the same.

Kindly confirm this by letter, so that we may attach it to the contract.

Yours very truly,
(Signed) DIAMOND GLUE COMPANY.
J. R. MORRON, *Manager.*

142 EXHIBIT 4.

Diamond Glue Company letter-head.

7, 27, '98.

Mr. Fred Vogel, c/o Pfister & Vogel Leather Co., Milwaukee, Wis.

DEAR SIR: I am going away Friday to be gone until Tuesday morning; just a short trip, but I have rather been awaiting a line from you as to developments in location so that we can get down to business just as soon as possible. Of course we want to be running in good order by Jan. 1st. We are making all our plans accordingly, and are laying the wires on entirely different lines than heretofore so as to meet these conditions. I know you are just as anxious to commence as we are, but I thought I would write you a few lines to let you know that we are awaiting your further instructions. Mr. Moorhead will probably be back here next Monday, and will be at your service from that time.

With kind regards, yours very truly,
(Signed) J. R. MORRON.

Are the specifications pretty nearly ready?

143 EXHIBIT 5.

Diamond Glue Company letter-head.

10, 27, '98.

Mr. Fred Vogel, Jr., pres. U. S. Glue Co., Milwaukee, Wis.

DEAR SIR: I want to congratulate you upon the cut of the new factory that we find in the "Hide & Leather" under date Oct. 22d. In writing up this article one thing was left out, and that was that we are to handle the production. All advertisements of this kind help to move product, and will put things into the channel into which they are to run. Please draw the attention of whoever writes these articles to be sure and put this in in all future ones so that the ball may be taken up on top of the hill and ready to be pushed off Jan. 1st.

Yours very truly,

(Signed) DIAMOND GLUE COMPANY.
J. R. MORRON,
V. Pres't, Manager.

144 EXHIBIT 6.

Diamond Glue Company letter-head.

1, 19, '99.

U. S. Glue Co. Ans. Jan'y 31, '99.

Mr. Fred Vogel, Jr., c/o U. S. Glue Co., Milwaukee, Wis.

DEAR SIR: I just returned from the East and I note the prices that the tanners desire to charge for their glue stock for the coming year, and I want to add to what has already been written you that at the present prices of glue (and the present prices look to me as though they would remain for some little time) there can no concern living make money if charged those figures on the glue stock. If you take into consideration the excess price over raw material last year the earnings will be satisfactory. I think it better to tell you just what I think in regard to the matter before rather than after taking.

Yours very truly,

(Signed) DIAMOND GLUE CO.
J. R. MORRON, *Manager.*

145 EXHIBIT 7.

United States Glue Company letter-head.

MILWAUKEE, WIS., *Jan.* 11, '99.

Diamond Glue Co., Chicago, Ill.

GENTLEMEN: Mr. Zohrlaut today reported on the result of his mission to Chicago, and I should judge that I was rather put out at Mr. Darlington's prices. The board today met and fixed the price for the coming year for the members of the United States Glue Co. at

2c. for calf and $1.75 for hide cuttings and $.75 for fleshings. The price of horse hides and horse fleshings was to be left for future settlement. I trust these prices are satisfactory to you, and that the company will be enabled to make money working them up into glue stock.

I enclose you a letter received from Mr. Woelfel, of Morris, Ill., and I would like to hear from you whether you know of his stock and what price you want to make him for his next year's production.

Awaiting your reply, I remain,

Yours truly,

(Signed) UNITED STATES GLUE CO.
FRED VOGEL, JR.

146 EXHIBIT 7*a*.

Diamond Glue Company letter-head.

1, 12, '99.

Fred Vogel, Jr., president U. S. Glue Co., Milwaukee, Wis.

DEAR SIR: Replying to yours of the 11th, you certainly did not expect that Mr. Darlington was sincere in his talk with Mr. Zohrlaut.

Now, as to your prices on glue stock for the coming year, you know as well as we do that these prices are far above the average paid by others and an advance over last year's, obtained by some of the members of the U. S. Glue Co., of over 100 % on the fleshings and nearly 35 % on the trimmings, which on the face of it already shows a big profit to the tanners. Still we assure you we will do all in our power to make the business of the U. S. Glue Co. a success. We are

Sincerely yours,

(Signed) DIAMOND GLUE COMPANY.
ARNOLD FRESHMAN,
Sec'y & Treas.

P. S.—As to the Woelfel stock, we bought this stock several years ago, and discontinued buying it on account of having trouble with him, as he limed his stock entirely too heavy. We would suggest that you do not name him any price, but have him quote you his lowest price, and if we see any money in the transaction would be only too glad to purchase his stock, but we think what he expects is those fancy prices, and you know we cannot afford to pay them just now.

147 EXHIBIT 8.

United States Glue Co. letter-head.

MILWAUKEE, WIS., *Jan. 17th*, 1899.

The Diamond Glue Co., # 218 La Salle St., Chicago, Ill.

GENTLEMEN: The bearer, Mr. W. G. Hanson, is the young man engaged to keep the books of the United States Glue Co. Kindly

give him all information necessary regarding your system of accounts.

Yours truly,
(Signed) UNITED STATES GLUE CO.
FRED VOGEL, JR.

148 EXHIBIT 9.

Diamond Glue Company letter-head.

2, 6, '99.

Mr. F. Vogel, Jr., Pfister & Vogel Leather Co., Wilwaukee, Wis.

DEAR SIR: I understand you are to be home today. I would like very much to have a talk with you in regard to the matter referred to, which may not amount to anything, but at the same time I want to talk it over with you so that we can get anything there is in it together, and, secondly, in regard to the Milwaukee plant. Mr. Spiegel was up there last week and we have a letter from Mr. Moorhead this morning. The cold weather has caused delay and we want to talk to you about that stock. It may be that it would be better for us to take in a few cars here at Chicago to ease matters up a little; and, if so, we do not want to touch anything but the fleshings. We might be able to work off some of your horse fleshings along with some of the other stock, as we want everything to run smoothly as far as the glue stock is concerned. Let me know by return mail or wire just when you can be here, as no doubt other matters will call you to Chicago.

Yours very truly,
(Signed) J. R. MORRON.

149 EXHIBIT 9*a*.

Diamond Glue Company letter-head.

3, 23, '99.

United States Glue Co., Milwaukee, Wis.

GENTLEMEN: We note yours of the 21st inst. You are correct. The writer was present at the directors' meeting of your Co. when it was agreed upon that the shortages of stock should not exceed 5 % *pro rata* during the month, but that did not include shipments made to the Diamond Glue Co., so at least I understood it. You will remember the writer told you that we will not object if the shortage does not exceed 5 %, but whatever above that amount we will be compelled to deduct. We cannot take in this stock on average shrinkage, because the stock ought to be all alike—that is, all drained alike—and, if it is, there ought to be no such shortage. This I have already explained to you in person.

Now, as regards the hide trimmings, you say you can readily sell them at $1.75. Now, this is not the market. You are simply charging that price to the U. S. Glue Co. You will remember both Mr. Morron and the writer have told you that these prices are excessive, and that neither you nor we can make any money at those prices—

that is, taking — the basis present prices on glue. Even at that figure we do not care for the trimmings. The last few cars received from the Pfister & Vogel Leather Co. came out all right in weight, but those from the Commerce St. tanners seem to shrink as usual. The reason for this is because the Commerce St. tanners do not allow the stock to drain, and it does not surprise us at all in that case that the shrinkage is so heavy. We will comply with your request and report weights to you as soon as the cars are weighed up. Now, regarding the shortage on car # 64302, we have gone over the weights carefully and cannot detect any mistake on our part. Don't you think it would be a good idea on the next car received from the Commerce St. tanners to have some one come here and see the weights as we unload the car, and then no doubt you can be convinced that our weights are correct as reported? We also would request that on cars where horse and cattle fleshings are shipped that the weight of each kind be designated on the bill.

Yours very truly,

(Signed) DIAMOND GLUE COMPANY.
ARNOLD FRESHMAN,
Sec'y & Treas.

150 EXHIBIT 10.

United States Glue Company letter-head.

MILWAUKEE, WIS., *April* 11, '99.

Diamond Glue Co., Chicago, Ill.

GENTLEMEN: We have your favors of the 10th and note what you say regarding the best way to take care of the limed fleshings now at the works. Mr. Moorhead says it is impossible to dry them properly at this time of the year, and we will have to continue our efforts to find some one to buy this stock from us.

Don't you think that we are making a mistake when we hope to sell the glue works to the trust? It strikes us that with the conditions prevailing in the East there will be little chance of carrying the deal through at present. The writer was out at the works this morning, and from what he saw there does not believe that we will be in shape to do any business before July first, and we have got to find some place to sell our glue stock before that period, as it will be impossible to keep it from damaging, piled up as we have it.

Yours truly,

(Signed) UNITED STATES GLUE CO.
FRED VOGEL, JR.

151 EXHIBIT 11.

United States Glue Co. letter-head.

MILWAUKEE, WIS., *May 6th*, 1899.

Diamond Glue Co., Chicago, Ill.

GENTLEMEN: Please ship to our factory, Carrolville, Wis., 50 lbs. of good glue, and oblige,

Yours truly.

(Signed) UNITED STATES GLUE CO.
FRED VOGEL, JR.

EXHIBIT 12.

Diamond Glue Company letter-head.

7, 5, '99.

Mr. Fred Vogel, U. S Glue Co., Milwaukee, Wis.

DEAR SIR: Mr. Freshman has not been well for some time and he is going to take a little rest. I find it is just about time our factory in Milwaukee is going to start, so I have given Mr. Hardon, superintendent of our factory here and elsewhere, a letter to Mr. Moorhead, whom he knows very well, and asked him to go and spend a week or so up there to help Mr. Moorhead in any way he can at the beginning, as it will be quite a responsibility for any man, and Mr. Hardon will undoubtedly be of considerable value in consultation. We have our hearts set upon making this institution a success and will do everything in our power to further its interests.

By the way, there was an article in the paper the other day, and I am trying to find out which paper it was in—one of your daily papers—saying that the American Glue Company was about to buy your company out, and a lot of other things. The American is advertising a little too much on the Milwaukee matter, and I want to send a letter up there to put in the paper. We don't like to be confused with that breed of pups.

152 Nothing new in regard to the syndicate matter. You are probably fully as well posted as I am, if not better. If anything comes up I will advise you, and expect the same from you. I do not bother you with theories in regard to the matter. Your time and my time is valuable, and when anything tangible happens we will get together quicker than lightning, but I don't want you to think that lack of correspondence indicates lack of interest. On the contrary, I am sawing wood.

(Signed) D. G. CO.
J. R. MORRON.

153 EXHIBIT 13.

Pfister & Vogel Leather Company letter-head.

MILWAUKEE, WIS., *July 7th*, 1899.

Mr. J. R. Morron, Chicago, Ill.

DEAR SIR: Your favor of the 5th received and contents duly noted. I met Mr. Harden at the works yesterday, and he appeared pleased with what he saw and no doubt will make you a full report, the gist of which I would like to hear. I am sadly disappointed at the slowness of our getting under way, and if I have occasion to build another glue factory it won't take 12 months to do it. Darlington has been hinting to Kimball that our glue stock was in a bad way, and it was doubtful whether it would be accepted. How much there is to this I am unable to judge, but it may be all a game to try and squeeze us if combine goes through. We have worked on the theory of late that — matter would not come to a

head this time, and are doing exactly as we would if no trust would be formed. I did not see the article you refer to, and hardly believe it worth while to reply. We will soon be ready to make glue, and, while we have been slow in getting ready, think we will have a good plant and one that will make us money.

I hope Mr. Freshman will come back to work thoroughly recuperated and full of vim to help push U. S. G. Co. to the front. I have heard yesterday Steinfeld had bought considerable glue stock in Canada and that Darlington had a message to come on East, which I understand he declined to do unless the money was at hand. Cody has closed the hair deal in Lynn and is still on the fence in Newark, as Steinfeld has not obtained consent of Newark tanners. I will be gone until Wednesday next, and will be pleased to hear from you occasionally.

I remain, yours truly,

(Signed) FRED VOGEL, JR.

154 EXHIBIT 14.

United States Glue Co. letter-head.

MILWAUKEE, WIS., *July 6th*, 1899.

Diamond Glue Co., Chicago, Ill.

GENTLEMEN: Will you kindly send us the names of firms you purchase the following goods from and state prices you pay in quantities stated:

10 gall. formaldehyde.
25 carboys sulphuric acid.
20 bbls. French oxide of zinc (imp. green seal zinc).
1 car sulphur.

Kindly let us hear from you as soon as convenient.

Yours truly,

(Signed) UNITED STATES GLUE CO.
FRED VOGEL, JR.

EXHIBIT 15.

Diamond Glue Co. letter-head.

CHICAGO, 7, 7, '99.

U. S. Glue Co., Milwaukee, Wis.

GENTLEMEN: Answering Mr. Vogel's letter of July 6th, the place we buy formald*y*hide is from Roessler & Hasslocher, #4 North Clark St., Chicago, and they charge us 21c. per lb. for it. We think it might be bought for less money in larger quantity. In regard to the sulphuric acid, we buy that from Chappel Chemical Company, Chicago. Now, if you buy it in carboys it will cost you about $30 per ton, but if you buy it in bulk in the tank car you can get it for about $8 per ton. The French oxide of zinc (imp. green seal zinc) we buy from Devoe & Raynolds. The price we have been paying is about 8½c. in small quantity. In regard to sulphur, we buy that

from A. S. Malcolmson, # 5 Hanover St., New York city, and I think we pay about $22 per ton f. o. b. New York city. They might be able to shade these prices in quantity or by buying together. If so, let us know, and if we can give you any other information also advise us.

Mr. Harden has just returned. He called me up and says you will not be able to run for 10 days or so, owing to the electricians not having completed their work, and also a lack of water, which will be remedied within a short time. I have notified Mr. Harden to be in readiness to be up there as soon as the factory is about to run, so as to be of any assistance he can.

Yours very truly,

(Signed) DIAMOND GLUE CO.
J. R. MORRON, *Manager.*

155 EXHIBIT 16.

United States Glue Co. letter-head.

MILWAUKEE, WIS., *July 12th*, 1899.

Diamond Glue Co., Chicago, Ill.

GENTLEMEN: Kindly advise us the rate of insurance you are paying on your plant in Chicago and elsewhere. Your prompt attention will oblige,

Yours truly,

(Signed) UNITED STATES GLUE CO.
FRED VOGEL, JR.

Ins. authorities here made rate of 1.75; we figured on one per cent.

EXHIBIT 17.

Pfister & Vogel Leather Co. letter-head.

MILWAUKEE, WIS., *Aug. 5*, 1899.

Diamond Glue Co., Chicago.

GENTLEMEN: As per telephone conversation had with Mr. Morron on Friday, we herewith enclose letters of Walburn-Swenson Co. regarding the difficulty we are having with the vacu-m pan erected by them at our glue works. Mr. Moorhead insists that the machine is too low; there ought to have been another section, so as to not give the glue liquors chance to be carried off with the condensation waters. Mr. Morris, of the Walburn-Swenson Co., who came here to examine the machine, told Mr. Moorhead that our machine had more pipes than the machines put in at Armour's factories. You will notice that Walburn-Swenson Co. contradict this fact in their letter, but claim that the fault is not with their machine, but owing to the age and condition of our raw glue material. Mr. Moorhead denies this and says he had no better result when boiling fresh material. We are not competent to decide as to who is correct in this controversy, but we are aware that here is a $300,000 plant

practically ready to go into operation, laying idle because this important part of the mechanical devices is not working satisfactorily. We must utilize every day and as early as it is possible get to work, for expenses are making great inroads into our capital, and we look to you as the practical man to give us early relief. We would very much like to have Mr. Freshman come up here and go over the entire plant and see what is necessary to be done in order to get in operation as soon as possible. We remain,

Respectfully yours,

(Signed) UNITED STATES GLUE CO.
FRED VOGEL, JR.

156 Walburn-Swenson Company letter-head.

CHICAGO, *August* 3, 1899.

Mr. Fred Vogel, Jr., Milwaukee, Wis.

DEAR SIR: We have your letter of the 2nd, enclosing copy of analysis of condenser water.

Our Mr. Morris reported here yesterday after having spent Tuesday at your glue-house. He reports that the evaporator is working nicely, and that there is little or no foam in the second effect, but that there is visible a mist or fog. We have never before had an occurrence of this kind in any of our evaporators, as heretofore entrainment of glue has been due to the liquor foaming and boiling over, but this does not occur in your machine, and the action of the liquor in producing the mist leads us to conclude that your stock has suffered considerable deterioration before being worked up, or else that there is something wrong in your method of working up the stock.

If we are correctly informed, the stock you are now working has been on hand in the lime for months, and the fact that your thin liquor shows so little density when tested with a hydrometer may account for the small yield of glue.

Your double effect is exactly like the one in Armour's glue works here where they evaporate 90,000 gallons of liquor every day, and is also the same as the machine we recently installed for them at South Omaha, and as they have never had any difficulty with entrainment, we do not see why your machine can be the cause of the trouble.

The analysis which you made of condenser water looks like quite a loss, but the steam condensed in the condenser is so diluted that it is impossible to make a reliable estimate, and, moreover, the water supplied to the condenser may contain large amounts of solids that would be precipitated in testing for glue.

We, of course, have had very little experience in the preparation of glue stock, but we have so many of our machines of like construction working satisfactorily that we are fully confident the trouble will not be found in the evaporator, and we are equally confident that when you have disposed of all your old material and begin on fresh stock you will have no more trouble.

If we can give you any farther information or assistance, we shall

be glad to hear from you, and would like to know the result of your farther investigations.

Yours very truly,

(Signed) WALBURN-SWENSON CO.
J. H. GIBSON.

Dictated.
J. H. G.

157 Walburn-Swenson Company letter-head.

CHICAGO, *July* 29, 1899.

United States Glue Co., Milwaukee, Wis.

GENTLEMEN: We have your letter of July 28, and note what you say about entrainment in the last effect. This peculiar action of your glue liquor is something new to us, as we have never before heard a complaint of this character. We are inclined to think that if you examine the matter carefully you will find it is only water that is dripping down from your vapor pipe. You understand, of course, that the atmosphere is a greal deal lower in temperature than the vapor in the vapor pipe, and necessarily some of the vapor is condensed and will drip down from the vapor pipe, and we believe that this is nothing more than condensed vapor or water.

In order to determine whether there is any entrainment you should chemically test the water coming from your condenser, and if there is any trace of glue in it you will be able to determine it easily. Please do this and let us hear farther from you.

Yours very truly,

(Signed) WALBURN-SWENSON CO.
J. H. GIBSON.

Dictated.
J. H. G.

P. S.—Since writing above have heard from Mr. Vogel by 'phone and will send our Mr. Morris to look into this matter on Monday.

158 EXHIBIT 18.

United States Glue Company letter-head.

MILWAUKEE, WIS., *Sept. 2nd*, 1899.

Diamond Glue Co., Chicago, Ill.

GENTLEMEN: Will you please send us about a yard of the glue netting you are using for glue frames to dry gelatine glue? We wish to have parties here give us figures on the netting.

We understand you have a hide-cutter for sale at one of your plants, and would be pleased to hear from you at what price this machine can be bought.

(Signed) UNITED STATES GLUE CO.,
Per C. P. BOSSERT, *M. E.*

EXHIBIT 19.

United States Glue Co. letter-head.

MILWAUKEE, WIS., *Sept.* 18, 1899.

Diamond Glue Co., 218 La Salle St., Chicago.

GENTLEMEN: Kindly put us in communication with some coopers in Chicago who make glue barrels. We are having a considerable amount of trouble in getting quotations on the sized barrels you wish us to use. We believe you pay 50c. for the same barrel down there.

Yours truly,
(Signed) UNITED STATES GLUE CO.
H.

EXHIBIT 20.

United States Glue Company letter-head.

MILWAUKEE, WIS., *Sept.* 21*st*, 1899.

Diamond Glue Co., 218 La Salle St., Chicago.

GENTLEMEN: Please give us the address of party you purchased press-cloths from and state price paid.

Have forwarded sample to the Rockwell Mfg. Co. as per your request.

Yours truly,
(Signed) UNITED STATES GLUE CO.
HANSEN.

159 EXHIBIT 21.

Diamond Glue Company letter-head.

9, 28, '99.

Mr. F. Vogel, c/o U. S. Glue Co., Milwaukee, Wis.

MY DEAR MR. VOGEL: Mr. Freshman on his return talked over with me the matters that you and he had under controversy when he was there last. Some one is evidently trying to cause dissatisfaction and make trouble for us both. The statements that have been brought to your ears are untrue, and no doubt Mr. Freshman told you the real state of affairs on each particular matter, and I simply write this letter to say to you that if at any time you get rumors of any kind we want you to continue to talk them over with us and ask us if they are so, and let us give you our explanation, because if you do not they will keep working on you, and we will not get together as closely as though we talked all matters of this kind over together. We figure that it is practically one concern in the sense of mutual interest.

And now in regard to the disposition of the glue: We are going to work and do our utmost to dispose of this glue in the best possible

channels, and if any one in the country can sell this glue we can. If conditions are such that the glue cannot be moved, why of course we cannot do the impossible, but we are going to put all the energy and ability we have into making that factory a success. As written you long ago, I do not think the factory will show much profit, if any, owing to the prices of raw material, but I can say to you earnestly and honestly that the manufacturing end and the selling department of that concern will show up creditably against any in the country at the end of a year or a year and a half. Furthermore, if at any time you find any one that has channels that are better than ours for placing glue, you will not in the slightest degree hurt our feelings, but, on the contrary, will be favoring us by giving us information that will enable us to dispose of the product, either directly or through the people who give you the information, if the same can be done so that our mutual interests are benefitted, and if at any time any one says to you that they think they could do better than we are doing let us know at once, and let us see if you cannot help us in adopting the methods they mention.

Yours very truly,

(Signed) J. R. MORRON.

160 EXHIBIT 22.

United States Glue Company letter-head.

MILWAUKEE, WIS., *Oct.* 14, 1899.

Diamond Glue Co., Chicago, Ill.

GENTLEMEN: The writer in comparing notes as to the sales that you have effected in glue and the amount of glue manufactured finds there is such a wide difference that he looks into the future with apprehension as to whether the business can be run with the capital we have now employed, either borrowed or paid in. We have today borrowed as much money as we should be required to to run this business. At any rate we have as much money invested as we were made to believe would amply suffice to run the glue plant on. The sales of glue thus far effected, compared with the amount manufactured, are so disappointing that we cannot help but feel alarmed. The estimates you have given us so far have in no way been borne out by the facts that are now existing.

As we have remarked above, we have got to the limit of the money we should be expected to borrow to run this business, and that we now depend entirely upon your efforts to effect sales that we may get accounts receivable on which to depend for the further payments of the raw material and manufacturing expenses.

We have manufactured approximately 320,000 lbs. of glue, of which 94,000 lbs. have been sold. There is such a wide difference between the amount manufactured and sold that our minds are filled with forebodings as to the future.

The writer would call your attention to the fact that the yields are such as would not even warrant us a profit if we bought the raw

material on a basis lower than existed last year, selling prices you are obtaining today considered.

Very truly yours,

(Signed) UNITED STATES GLUE CO.,
Per ALBERT TROSTEL, *V. Pres't*

161 EXHIBIT 23.

Holland House letter-head.

OCT. 18, 1899.

United States Glue Co., Milwaukee, Wis.

DEAR SIRS: Your letter of the 14th to the Diamond Glue Company, signed by your vice-president, Mr. Trostel, has been forwarded to me here at New York, and although I understand from a letter that accompanies it that Mr. Freshman has an appointment with you, at the same time I think letters of this kind should be answered so that our ideas may be on record with yours. I cannot say without looking at the sales as to just the number of lbs. we have sold, nor can I state without looking the matter up just how much glue has been turned out at Milwaukee, but we want to say this to you—that we are doing our utmost to sell your product and to place it intelligently and so that results will follow. If you desire to make it a question of seeing how quickly we can dispose of it, we will be very glad to work on these lines, but of course sacrifices will have to be made in order to distribute the production that way.

If you will look over your particular department, you will find that during the past year things have not turned out exactly as you thought they would. You had every reason to suppose that your plant would be finished long before it was, but contingencies over which you have no control caused the delay. Just so in the selling department, and while I have no doubt in my own mind that the selling department of this company will be well managed and that the sales will be satisfactory in a reasonable time to all concerned, still it would be useless for us to say that we could move the glue just as we want to without sacrifice. I sincerely hope you will have enough confidence in us to allow us to spend all of our time trying to dispose of your glue rather than spending part of it trying to have things run smoothly with our factors. A good deal of pressure will be brought to bear upon you to try and show that we are not selling fast enough or well enough. We have no time to spend with arguments of that kind. Any time you know of any way that the goods can be handled to better advantage, if you will let us know we will all get together, and no doubt arrangements can be made that will be satisfactory to all parties concerned.

We will continue to handle this business as though it were our own, giving it the benefit of every ability that we have. The only promises we will make are those that we have made before—that we feel we are in the position to do as well by you, if not better, than any one else, and that if the business is run on business lines

that we have every confidence in its showing a reasonable profit, either directly or indirectly.

With kind regards,

Yours very truly,

(Signed) J. R. MORRON, *Vice-Pres't.*

162 EXHIBIT 24.

Diamond Glue Company letter-head.

10, 27, 1899.

Mr. Fred Vogel, c/o U. S. Glue Co., Milwaukee, Wis.

DEAR SIR: I have just finished looking over all the samples of glue on hand, and, owing to troubles that we have had and the condition of the stock, etc., a good deal of it is very dark and off. There is one lot of glue that I picked out this morning that I want to try to sell to the Diamond Match Co. They buy a good many car-loads of glue, and I want to try and work in some of these lots. They have been accustomed to buy one grade of glue from us and are very particular in regard to the matter, and if they knew that we had changed the production they would immediately criticise the glue; therefore, on this sample lot, I want to ship it to them as from ourselves. I want the glue billed to the Diamond Glue Co., Chicago, for which we will send you a check, the price being 11¾c. here. The price we get for this glue is 11½c., delivered in Oswego, N. Y., but I am naming the other price to you because it is the price we expect to get from them on any new arrangement, but we are willing to stand the difference on this test. We wanted to write you a letter explaining why we wanted the glue billed to the Diamond Glue Co. direct instead of the shipper in this case.

If this glue proves satisfactory, then I can use as an argument that it does not make any difference whether it comes from Milwaukee or not. It is a low-testing glue, and I am in hopes will do their work, as they do not require a great adhesive quality, but other peculiarities; therefore we will send a regular order up to the U. S. Glue Co. to ship us this glue, and tender this explanation to you by this letter.

I will leave here at eleven o'clock Monday and will be in Milwaukee about one o'clock and will meet you at the Pfister hotel.

(Signed) DIAMOND GLUE COMPANY.
J. R. MORRON, *Manager.*

163 EXHIBIT 24*a*.

Copy.

Diamond Glue Company letter-head.

10, 27, '99.

United States Glue Co., Milwaukee, Wis.

GENTLEMEN: We herewith inclose order # 82, Martin Dawson Co., Chicago, Ill., for one barrel gelatine, lot # 29.

Order # 83, Diamond Glue Co., Chicago, Ill., eighteen barrels, lot # 38.

We also wish you would ship by express to the Diamond Glue Co., room 309 # 101 Beekman St., New York, N. Y., two pounds each of lot 28¾ and 31½.

(Signed) DIAMOND GLUE COMPANY.
ARNOLD FRESHMAN, *Sec'y-Treas.*

164 EXHIBIT 25.

United States Glue Company letter-head.

MILWAUKEE, WIS., *Oct.* 28, 1899.

Mr. J. R. Morron, gen'l manager Diamond Glue Co., Chicago, Ill.

DEAR SIR: I have your favors of the 27th inst. and in reply thereto beg to say that we do not feel inclined to follow your advice, both as to the purchase of Cudahy pigs' feet nor the sale of glue to the Diamond Match Co. at 11¾c., and I want to give notice that sales of our goods so much below their actual cost and below market price will not be permitted, and that we will expect you to place our goods at prices that will at least not ruin us in the first year. With the prices Swift is starting the new season of 1900 and 1¼c. offered for pigs' feet, cheap glue will be impossible, and we prefer to hold our stock for fair prices sooner than sell to Diamond Match or Glue Co. I wish you would defer your visit until Monday evening, and if agreeable I will meet you at the hotel at 8 p. m.

I remain, yours truly,
(Signed) FRED VOGEL, JR.

165 EXHIBIT 26.

Diamond Glue Company letter-head.

NOV. 3.

Fred Vogel, Jr., president United States Glue Co., Milwaukee, Wis.

DEAR SIR: Referring to the conversation that you had with the writer in our office a few days ago, in which you asked us to make you a proposition in regard to releasing you from the contract entered into between the United States Glue Company and the Diamond Glue Company under date of June 25th, 1898. Since seeing you I have given this matter a great deal of thought and have talked the matter over thoroughly with my associates, Mr. Spiegel and Mr. Freshman, and we lay the following facts before you, not in the form of a proposition altogether from a business standpoint, because from a business standpoint, as we both know, we have fulfilled our contract with you to the very best of our ability and have in no way violated its terms.

In asking me to make you a proposition as to what we would do in making terms to nullify this agreement, it is evident that you do this believing that you could make more advantageous arrangements with some one else, and our disposition, therefore, would be not to stand in your way in making what you consider to be more profitable connections. At the same time you must take into con-

sideration what this means to the Diamond Glue Company, and in making your arrangements with other parties no doubt they would be more than willing to assume any costs of release that we might make upon you. This they should do from a standpoint of equity.

Since June 25th, 1898, when we made this contract with you, it has necessarily, both because of the conditions agreed upon and because of its general effect upon our business, necessitated very great changes in plans, operation, and organization of our factories and forces. We were obliged to take our Chicago factory, which hitherto had manufactured hide and calf glues at a decided profit, and, with a considerable outlay of money, equip it for an entirely different output, expecting to draw upon the Milwaukee factory for the kind of glue heretofore manufactured at that plant. Therefore we did not bid on contracts for glue stock to run this factory, and the same went to other manufacturers, to our immediate loss and prospective gain. Again, our factory at Madison, Ind., we were obliged to shut down entirely, and not a wheel has turned in the manufacture of glue there. It is unnecessary for us to state the loss in this connection, also being left without the raw material with which to operate if we so desired at this time. Not a great while ago an output of a factory for hide glue that we had long wanted was made to us, and in order that we might devote our attention more particularly to your product we turned the proposition down, although it was profitable, and it was accepted by our competitors; therefore in naming the figures that we do to you it would be impossible for us to give you an idea of the indirect loss of the release of the product of the U. S. Glue Company's plant. As merchants you will very easily see our position in this respect.

Should our arrangement continue in force, in order to make
166 the factory profitable it is well known to us both that you would manufacture at least 10,000 # of glue per day, or 3,000,000 # per year. Figuring a very low selling price on this glue of all grades at 12c. per lb. would amount in dollars and cents to $360,000 per annum. Figuring your sales of grease at $40,000 per year would make a total of $400,000 per annum, on which we, as selling agents, would receive 10% commission, or $40,000 per year on the unexpired term of the contract in question.

At the time you made your agreement with us another concern made you a proposition to handle your product for 7½%. You will remember mentioning this to me again in the office a day or two ago. This concern, or any other that would approach you now, would be willing to take your product for a less figure than at that time, because your plant is now in active operation and represents a great deal of work and thought that they would have had to put into this project had they started with you in its infancy. It would be, therefore, we think, a very meager consideration, more than fair, you must acknowledge, on our part to ask in consideration of the release the difference between what you could have the product handled for today and our original proposition, together with compensation for actual time and costs pertaining to the building of the plant.

Two and one-half per cent. on $400,000 would amount to $10,000 per annum for the unexpired portion of the term, or if you would prefer to allow us to continue under the same arrangement on grease, might be arranged for a less amount. I would be unable at this time to give you the correct figures in regard to the time, labor, and costs, and direct outlay of money that we have made, but the figure we would submit would be fair.

You spoke to me in regard to cleaning the matter up at once. I suppose this could be arranged by discount. The figures I have submitted to you, as you will see yourself, do not in any way cover our indirect losses as mentioned in the first part of this letter. We would also ask you to protect us on any contracts or obligations that may arise from the shipment of sample barrels of your glue, which in a great many cases we have submitted as a basis for contract. As we are totally out of this grade of glue because of this arrangement, we would naturally have to be protected on the amounts that might be ordered by consumers whose sample barrels have gone out to date.

You cannot help but agree with us that our proposition, when you analyze it, is more than fair. I have not tried to make any fictitious claims; I mention the above as my ideas from a standpoint entirely personal, endeavoring to make a proposition that will be absolutely fair to you, and that will in part remunerate the Diamond Glue Company for what it has done and for what it would have reaped. I am more than anxious that the United States Glue Company be a success, and if conducted on a sound basis it will be.

Yours very truly,
(Signed) J. R. MORRON.

I write this so that you may consider our ideas, and I will see you on one of the days agreed upon.

167 EXHIBIT 26*a*.

United States Glue Company letter-head.

MILWAUKEE, WIS., *Nov.* 15, 1899.

Diamond Glue Co., Chicago, Ill.

GENTLEMEN: We beg to acknowledge receipt of your favor, without date, signed by Mr. Morron, the reply to which has been delayed, owing to the absence of two of our directors.

I am at this date unable to give you a reply to your letter, but will do so as soon as we can have a full meeting of the board.

We remain,
(Signed) UNITED STATES GLUE CO.
FRED VOGEL, JR., *Pres.*

EXHIBIT 26*a*.

Diamond Glue Company letter-head.

11, 16, '99.

United States Glue Co., Milwaukee, Wis.

GENTLEMEN: We herewith inclose order # 118, D. H. Fritts & Co., for two barrels of moulding glue, lot # 51. Please note that same is to be shipped to us for delivery. The terms on this order are, net, ninety days, less 3 % if paid between the 1st and 5th of the month following shipment.

Order # 119, Wm. Paterson & Sons Co., one barrel gelatine, lot 24.

Order # 120, North & Judd Mfg. Co., one barrel flake, lot 43.

(Signed) DIAMOND GLUE COMPANY.
ARNOLD FRESHMAN,
Sec'y & Treas.

168 EXHIBIT 27.

Copy.

Diamond Glue Company letter-head.

11, 16, '99.

United States Glue Co., Mr. Fred Vogel, president, Milwaukee, Wis.

GENTLEMEN: Yours of the 15th is noted, and we will await hearing from you in regard to the matter referred to in my letter, which should have been dated Nov. 3rd. I think the matter should be taken up at once, as it is unnecessary for me to explain our position to you in regard to the matter of distribution. You have stated that you could make arrangements that will be more advantageous than our contract, and you can readily see that it will be very embarrassing for us to send in orders now to various concerns and then have to write them in a short time that some one else will supply them with the same grade of glue. We would be very glad to relieve that stock. We will buy 100,000 to 200,000 # of off lots from you, so as to bill it ourselves, and thus avoid being put in the position above mentioned, if you so desire.

(Signed) DIAMOND GLUE COMPANY.
J. R. MORRON, *Manager.*

169 EXHIBIT 28.

United States Glue Company letter-head.

MILWAUKEE, WIS., *Nov.* 18, 1899.

Diamond Glue Co., Chicago, Ill.

GENTLEMEN: Your favor of the 16th inst. received, and I am as anxious as you are to get to some final decision, and we will do so as soon as we can get the quorum of the board of directors.

I want to correct your statement which you make that I stated I could make arrangements that would be more advantageous than

our contract. What I told you was that before entering into contract with you we could have made an arrangement at a lower rate of commission than we pay you.

We note your position as to sales of glue, but we do believe that it is fair that as long as you keep selling our grease you certainly ought to keep selling our glue at prices that will not net us a loss.

If you prefer to buy off lots of glue, you will please make us your best net cash offer at the factory for the lot that you want to buy and we will give it a prompt consideration.

(Signed) UNITED STATES GLUE CO.
FRED VOGEL, JR., *Pres't.*

170 EXHIBIT 28*a*.

Diamond Glue Company letter-head.

11, 20, '99.

United States Glue Co., Fred Vogel, Jr., president, Milwaukee, Wis.

GENTLEMEN: Your letter of the 18th noted. When we talked over the matter of transferring the contract you will remember that you stated to me that your reason for transferring the same was that you could make better arrangements, and, of course, that would be your only reason for changing the contract. In regard to the selling of the grease, that we do very readily, as it is a commodity that sells in a different way than glue, and by selling grease to brokers or users we do not make ourselves competitors with the output of your factory at a future date, while on glue we do. We inclose you an order herewith for about 375 barrels of glue, which we will be willing to take in order to reduce that stock, the United States Glue Co. to sell this glue to the Diamond Glue Co. at 12½c. per lb. here all around, regular terms, and, of course, we are to receive the same commission on this as though it had been sold to any one else. I want to say to you that in paying this price for this quantity of glue we are doing it simply to reduce that stock, and the figures named are full market price. We will take the glue in ground form, so that we can mix it and make somewhat of a decent average of it, and take it in shipments, half within thirty days and half within sixty days.

Awaiting your reply, we remain,

(Signed) DIAMOND GLUE COMPANY.
J. R. MORRON, *Manager.*

P. S.—Will take it all in at once, if more convenient to you.

171 EXHIBIT 29.

United States Glue Company letter-head.

MILWAUKEE, WIS., *Nov. 20th*, 1899.

Diamond Glue Co., Chicago, Ill.

GENTLEMEN: Referring to your letter of Nov. 3rd, signed by your Mr. Morron, and referring to conversation had between the writer and Mr. Morron in regard to the termination of the contract entered into by you and this company, will say:

That this letter was received during the absence of the majority of the board of directors; therefore an answer has been unavoidably delayed.

We desire to repel most emphatically your suggestion that we are endeavoring to bring about a cancellation of this agreement in order to enter into arrangements more profitable or more beneficial to ourselves. We have no such agreement in view, although, of course, if we are to continue to manufacture, and our relations with you are terminated, we shall be obliged to make new arrangements, not necessarily new connections, in order to put goods upon the market.

As the writer advised you, it was our desire to amicably terminate the relations which have existed between us, and to this end the suggestions were made to Mr. Morron by our Mr. Vogel, which are referred to in your letter. We still wish to accomplish this result, if possible; but we feel that you have given us sufficient reason for treating this contract as at an end.

Your agreement was to sell our product. So far you have been able to move only about 22% of the output. Your agreement in this regard was absolute. You now seem to consider that your obligation in this respect was conditioned on your ability to in-
172 troduce our goods, and your ability so far has extended only to 22% of the amount manufactured. Nor do you give us any positive assurance in this respect as to the future. You represented to us that our new factory, properly equipped, should produce glue at a manufacturing cost of 2½c. per pound. In the construction and equipment of this factory you had carte-blanche, and no expense was spared; yet with all of the appliances and equipment which you could suggest, the manufacturing cost is still over four and a quarter cents. With this expense, and with the prices which you have been able to obtain and those you indicated in your letter as probable in the future, our works have been and must continuously be run at a loss. There is, of course, nothing in our relations which requires the U. S. Glue Co. to operate its factory at a loss, and therefore, unless this difficulty is remedied, the works will have to cease manufacturing.

We can see, therefore, only the choice between the two courses indicated, either to shut down our plant or to end the contract with you. If this contract were still allowed to continue and the plant were to close down, you will see that no benefit will accrue to you

from the continuance of the contract; and, on the other hand, if we terminated the contract, you can establish no damages, for the reason that unless we continue to produce you get no benefit. There are other circumstances which lead us to believe that we have a right to treat this agreement as abandoned, but we have mentioned the foregoing as being alone sufficient.

Hoping that you will see the matter in the light in which it is represented, and that you will appreciate the fact that we cannot go on making a daily loss, and also hoping that an amicable adjustment may be speedily reached, we remain,

(Signed) UNITED STATES GLUE CO.
FRED VOGEL, JR., *Pres't.*

173 EXHIBIT 30.

Diamond Glue Company letter-head.

11, 22, '99.

United States Glue Co., Milwaukee, Wis.

GENTLEMEN: Your letter of Nov. 20th, signed by your president, Mr. Fred Vogel, Jr., in answer to ours of Nov. 3rd. is noted, and the letter still leaves us in the dark as to our proposition which we made you under that date at your request.

Answering your letter, we wish to start out with the distinct understanding, as you have, that we desire to settle this matter amicably. When Mr. Vogel was in to see me some little time ago I asked him the direct question as to whether he was figuring on other arrangements then. He answered that he was, but that he would rather that I would not ask him any questions, as he was not in a position to answer them. It would be unnecessary for us to state that any new arrangements you make would be more advantageous, as of course you would not make any change unless the new arrangements were to be more advantageous than the old.

We are surprised to note that you think you have sufficient reason for cancelling our agreement, and we note the points that you make. We do not care to go into this matter extensively at this time, because, as stated above, we both desire to settle the matter amicably, and therefore a controversy on these lines would not be altogether necessary. There is one point that you make, however, in regard to the interpretation of our contract, in which we differ with you, and will draw attention to this part of your letter, viz., that in our contract we absolutely agree to sell your product. This statement of yours, of course, is brought about by the following clause in our contract, dated June 25th, 1898: "It is further agreed that party of the second part shall control, handle and sell the entire output including glue and bi-products of said factory." Now, the real meaning of this is that we are to be the exclusive selling agents of the factory. We certainly make no money unless the product is sold, but had it meant that we guarantee the sale of the glue as soon as it was turned out, or at any specified time, I think the contract would so have stated. In making your statement that we absolutely

agree to sell the entire output you have taken from the clause above quoted only one part of it. If you construe that sentence to mean that we agree to sell the product, then you must also take the rest of the sentence into consideration and figure that we also control the entire product; and if we interpret that literally as you do your part of it, it would mean that we could sell that product at any price, and you and we both know that if we choose to sacrifice that glue and offer it at a very low price that we would have no trouble in selling the entire output even before the glue was put on the nets to dry. Therefore I think it would be best for us both to interpret this clause in the way in which it was meant. We consider that we have filled our agreement to the letter, and it is not because of any weakness on that score that we have agreed to do anything in our power to aid you in what you consider your best interests.

174 This matter is of a great deal of importance to you and to us, and it should be settled definitely. Will you not set a time at once that we can talk this matter over, and remember that we are willing to be fair? You cannot help but see this, and we hope that you feel the same way.

(Signed) DIAMOND GLUE COMPANY.
J. R. MORRON, *Manager*.

EXHIBIT 30*a*.

Diamond Glue Co. letter-head.

CHICAGO, 11, 24, '99.

Mr. Fred Vogel, pres. United States Glue Co., Milwaukee, Wis.

DEAR SIR: Referring to our offer to take some glue from you a day or so ago, it will be necessary for us to know whether you desire us to take this glue or not at once, so that we may regulate our supply elsewhere accordingly.

Will you please let us hear from you at once?

Yours very truly, DIAMOND GLUE CO.
(Signed) J. R. MORRON, *Manager*.

175 EXHIBIT 31.

United States Glue Co. letter-head.

MILWAUKEE, WIS., *Nov.* 25, 1899.

Diamond Glue Co., Chicago, Ill.

GENTLEMEN: Your favor of the 20th and 24th inst., offering to buy glue, received. We regret that the prices you offer are such that they would cause us a serious loss, and we therefore decline the offer.

As near as we can figure we are losing money at the prices you sold these grades of glue, and your offer is still lower, which would mean an additional loss of 12 to $1,300 on the lot.

We remain

Yours truly, UNITED STATES GLUE CO.
(Signed) FRED VOGEL, JR.

EXHIBIT 32.

Diamond Glue Co. letter-head.

CHICAGO, 11, 27, '99.

U. S. Glue Co., Milwaukee, Wis.

GENTLEMEN: Your letter of the 25th in regard to our offer on glue is noted. If you have looked into those glues, you will find that they are off lots principally, and that if you submit samples elsewhere and when you get right down to selling you would find that no one would pay you over that price. If your present negotiations do not mature and you care to dispose of the glue on the lines mentioned, we will be glad to take the matter up with you.

I have not received any answer to our letter asking for an appointment to talk over the matter of great importance to both.

Yours very truly, DIAMOND GLUE CO.
(Signed) J. R. MORRON, *Manager.*

176 EXHIBIT 32*a*.

Copy.

Diamond Glue Co. letter-head.

CHICAGO, 11, 27, '99.

United States Glue Co., Milwaukee, Wis.

GENTLEMEN: We herewith inclose you copy of contracts taken and deliveries of glue to be made: Chase-Hackley Piano Co., 100 to 125 bbls.; St. John's Table Co., five barrels monthly, beginning Jan. 1st, with the privilege of increasing to twelve barrels each or any month during the year; Banderob-Chase Co., 65 to 75 barrels, to be taken monthly shipments during 1900.

We herewith inclose order # 134, Martin Dawson Co., Chicago., for one barrel gelatine, lot 29.

Order # 135, Harshaw, Fuller & Goodwin Co., Cleveland, Ohio, one barrel ground glue, lot 48.

(Signed) DIAMOND GLUE COMPANY.
ARNOLD FRESHMAN,
Sec'y & Treas.

177 EXHIBIT 33.

MILWAUKEE, WIS., *Nov.* 28, 1899.

Diamond Glue Company, 218 La Salle St., Chicago, Ill.

GENTLEMEN: We have your favor of the 27th inst., enclosing contracts for future delivery of glue, which you seem to have assumed to make. We cannot recognize these contracts for future delivery for reasons that must readily occur to you and which appear in your letter of the 20th inst.

The termination of your arrangement for handling our product has been before us both, and we understood from your last letter

that you would abstain from selling our glue product for future delivery since it would make us your competitors in the future.

You will also remember that our Mr. Vogel notified you some days since by telephone, in talking with your Mr. Morron, that under the circumstances, while we had no objection to your selling glue for fair prices, we did not want to be tied down for future deliveries. We recognize and will fill the small orders enclosed with your last letter, viz., orders 134 and 135 to Martin Dawson and Harshaw, Fuller & Goodwin Company respectively.

We desire also to confirm the arrangement made with your Mr. Morron by telephone this day for a meeting on Friday next, Dec. 1st, at 2 p. m., here in Milwaukee.

Pending this interview with your Mr. Morron, we desire you to cease the sale of our product.

Yours truly, UNITED STATES GLUE CO.
(Signed) FRED VOGEL, JR.

178 EXHIBIT 34.

United States Glue Co. letter-head.

MILWAUKEE, WIS., *Dec. 2nd*, 1899.

Diamond Glue Co., Chicago, Ill.

GENTLEMEN: We have your two favors of the 1st inst., enclosing order for #141, #142, #143, #144. We are perfectly willing to fill these orders and allow you 10% for commission and guaranty of the payment on the amount thereof, and shall be pleased to receive orders from you and allow you a similar commission until further notice on such orders as seem to us proper to be filled. As we wrote you on the 28th ult. we wished you to desist from making any further sales as representing us and as we explicitly explained to your Mr. Morron yesterday that the agreement formerly existing between your company and the U. S. Glue Co. was at an end, we, of course, cannot recognize these orders or any orders as coming within or being governed by the agreement.

We remain,

Yours truly, UNITED STATES GLUE CO.
(Signed) FRED VOGEL, JR.

179 EXHIBIT 35.

MILWAUKEE, *Dec.* 4, 1899.

Diamond Glue Co., Chicago, Ill.

GENTLEMEN: After our conversation with your Mr. Morron on Friday last we endeavored to draw a new contract covering a portion of the subject-matter of the old contract, which has been terminated and abandoned, but inasmuch as Mr. Morron informed us that you would accept no contract containing any guaranty of substantial performance on your part we found it impossible to draft a contract which would be at all fair to us. We do not see, therefore,

how we can renew our relations in such a way as to satisfy you and fully protect ourselves.

Inasmuch, however, as you dispute our right to treat the former agreement as at an end and indicate that you claim damages because of our refusal to longer recognize the former agreement, we desire to end all controversies between us, and although we claim full right in the law to treat the said agreement as abandoned and at an end and dispute any claim on your part to any damages whatever, and although we, on the other hand, claim damages against you for various breaches of the said contract, we will, for the sake of peace, as a compromise of all controversies on the subject and without prejudice, offer to you, as we did on Friday last through Mr. Quarles, the sum of $5,000.00 to settle and compromise the said disputes and controversies.

Yours truly, UNITED STATES GLUE CO.
(Signed) FRED VOGEL, JR.

180 EXHIBIT 36.

Diamond Glue Co. letter-head.

CHICAGO, 12, 5, '99.

United States Glue Co., Milwaukee, Wis.

GENTLEMEN: Your favors of the 2nd and 4th inst. received, in which you declare that you will no longer recognize our contract with you or carry out its agreements. This company denies your right to do this, and insists that you cannot thus arbitrarily terminate it merely because you desire more favorable terms than we both agreed to when the contract was made.

Before deciding what action to take with reference to your offer, we would like to know what you mean by your claim that we are guilty of "various breaches of the said contract." We have kept our agreement in good faith, and if we are to be deprived of its benefits we ought to be notified explicitly of the reasons for the action.

Yours very truly, DIAMOND GLUE CO.
(Signed) J. R. MORRON, *Manager.*

181 EXHIBIT 37.

MILWAUKEE, *Dec.* 7, 1899.

Diamond Glue Company, 218 La Salle St., Chicago, Ill.

GENTLEMEN: We are in receipt of your favor of the 5th inst. in regard to our refusal to further recognize the contract formerly subsisting between us.

You suggest, as you have suggested before, that our action is arbitrary and based simply on a desire to secure more favorable terms than were agreed upon when the contract was made. We again state to you, as we have before stated, that this action on our part is not arbitrary, nor is it based on any desire to secure more

favorable terms. Our action is, in our judgment, based on good and sufficient legal grounds, and, among other reasons, goes upon breaches of the contract by you and failure on your part to perform.

As to the second request contained in your letter, we are of the opinion that it will do no good to argue the question. You state that you have kept your agreement in good faith, but this statement can be accurate only on the theory, which you seem to adopt, that the contract imposes no obligation whatever upon you.

We must, with all due respect, decline to enter into a controversy by correspondence.

Yours truly, UNITED STATES GLUE CO.
(Signed) ALBERT A. TROSTEL, *Vice-Pres.*

182 EXHIBIT 38.

MILWAUKEE, *Dec.* 7, 1899.

Diamond Glue Co., 218 La Salle St., Chicago, Ill.

GENTLEMEN: We have your favor of the 5th inst., with statement of commission account.

We are inclined to pay the amount of net commissions, being 10 % on the amount of sales, subject to the deductions which you mention, for the reason that you have assured us that this 10 % all goes as expense to you on making the sales; but in so doing we wish it distinctly understood that in so reimbursing you for your expenses we are not waiving any of our claims of damages against you for breaches of your contract.

We are inclined, therefore, as soon as we can check up this statement, to send you a check for the amount, but with the express understanding that this shall not be taken to waive any of our rights in the premises, but shall be without prejudice to our said claims, and will be merely treating this matter of commissions as a separate matter.

Yours truly, UNITED STATES GLUE CO.
(Signed) ALBERT A. TROSTEL, *Vice-Pres.*

183 EXHIBIT 39.

United States Glue Co. letter-head.

MILWAUKEE, WIS., *Dec. 18th*, 1899.

Diamond Glue Co., 218 La Salle St., Chicago, Ill.

GENTLEMEN: Enclosed please find our check for $1,545.29 to apply on commissions.

Kindly acknowledge receipt and oblige,

Yours truly,
(Signed) UNITED STATES GLUE CO.

184 EXHIBIT 40.

Return this to Diamond Glue Co.; general offices, 218 La Salle St., Chicago, Ill.
Order No. 137.
Date sold: 12, 1, '99.
Verified: ——. Salesman: Phila. Date billed: ——. Terms: Regular.
Sold to Wm. Ritter & Bros. Town and State: Philadelphia, Pa. Ship via ——.
Rating: ——. Register No. 144. Ledger folio —.

Shipper's check.	Quantity.	Grade.	Bbl. No.	Gross weight.	Tare.	Net weight.	Price.
25	1 bbl.	V. opaque glue.	472	268	36	232	13¾c., 31.90

185 EXHIBIT 41.

List of Shipments by United States Glue Co. on Sales by Diamond Glue Co.

Date. 1899.			Order No.
8, 25.	W. J. Gibson & Co., Chicago	2 cars grease .... 3¾c...	1
9, 4.	" " "	" " " .... " ..	"
9, 6.	Anti Kalsomine Co., Gd. Rapids	1 " V. glue... 12c....	2
9, 9.	Berkey & Gay Furn. Co., Gd. Rapids	10 bbls. V. glue .. 11¾c...	3
9, 15.	Stollenwerk & Weber, S. Milwaukee	1 " " " . 15c....	4
9, 26.	W. J. Gibson & Co., Chicago	1 car grease..... 3¾c...	5
9, 26.	Sligh Furn. Co., Gd. Rapids	1 bbl. V. glue.... 12½c...	6
9, 29.	Stuyvesant Glue Co., St. Louis	1 " " " ... 13.60..	7
"	" "	1 " " " ... 12.80..	"
"	" "	1 " " " ... 12c....	"
"	" "	1 " " " ... 11.20..	"
"	" "	1 " " " ... 10.40..	"
"	" "	1 " " " ... 9.60..	"
"	Dillingham Mfg. Co., Sheboygan	1 " " " ... 12½c...	8
"	Starr Piano Co., Richmond, Ind.	1 " " " ... 13c....	9
"	" " "	1 " " " ... 12c....	"
"	Cochran Chair Co., Cochran, Ind	2 " " " ... 12½c...	10
9, 30.	Geo. R. Watson & Co., Chicago	2 " " gel..... 18c....	11
"	E. Goldman & Co., Chicago	1 " " " ..... 18c....	12
"	Oshkosh Furn. Co., Oshkosh, Wis.	25 lbs. " glue.... 13¾c...	13
"	" " "	25 " " " ... 13¾c...	"
"	" " "	25 " " " ... 12½c...	"
10, 3.	Trowbridge Piano Co. (Franklin, Mass.)	1 bbl. " " ... 15c....	14
"	Banderob-Chase Co., Oshkosh, Wis	1 " " " ... 13¾c...	15
"	" " "	1 " " " ... 12c....	"
"	Heywood Bros. & Wakefield, Chicago	5 " " " ... 12c....	16
"	Elkhart Carriage & Harness Mfg. Co., Elkhart.	1 " " " ... 13¾c...	17
"	Wells-Kreighbaum Mfg. Co., So. Bend, Ind.	1 " " " ... 12½c...	18
10, 5.	Albion Paper Co., Holyoke, Mass	1 " " " ... 13¾c...	19
"	The Graham Mfg. Co., Derby, Conn	1 " " " ... 15c....	20
"	Grand Rapids Piano Case Co., Gd. Rapids.	1 " " " ... 12½c...	21
10, 6.	Burr Bros., Guelph, Ont	2 " " " ... 13¾c...	22
"	P. Schock & Co., Minneapolis, Minn	1 " " " ... 13c....	23
"	Sargeant Mfg. Co., Muskegon, Mich	1 " " " ... 13¾c...	24
10, 7.	C. F. L'Hommedieu, Chicago	1 " " " ... 13¾c...	25
"	Richardson Piano Case Co., Leominster, Mass.	5 " " " ... 12½c...	26
"	Knechtel Furn. Co., Hanover, Ont	2 " " " ... 13¾c...	27

Exhibit 41—Continued.

Date. 1899.				Order No.
10, 7.	The Hill Chair Co., Wiarton, Ont	1 bbl.	V. glue	13½c	28
10, 9.	Hargreaves Mfg. Co., Detroit, Mich	1 "	" "	14c	29
10, 10.	W. J. Gibson & Co., Chicago	1 car	B. grease	3½c	30
"	Schroeder Paint & Glass Co, Detroit	1 bbl.	V. gel	18c	31
"	Wm. Reid & Co., Detroit	1 bbl.	V. gel	18c	32
"	Croft & Allen Co., Philadelphia	1 "	" "	18½c	33
"	Elmer E. Hart, Fitchburg, Mass	1 "	" "	18c	34
"	Jackson Knife & Shears Co., Fremont, O.	1 "	" glue	13¾c	3
10, 14.	The Matthews & Willard Mfg. Co., Waterbury, Conn.	1 "	" "	14c	3
186					
10, 16.	E. H. Jacobs Mfg. Co., Danielson, Conn	1 bbl.	V. gel	20c	37
10, 13.	Quaker City Chocolate & Confectionery Co., Phila.	1 "	" "	18½c	38
"	Ritter Bros., Philadelphia	1 "	" glue	13½c	39
10, 14.	J. W. Clarks Sons, Philadelphia	1 "	" "	12½c	40
"	Sieling Furn. Co., Walkerton, Ont	1 "	" "	13½c	41
10, 14.	S. Hadley Lum. Co., Chatham, Ont	1 "	" "	13½c	42
10, 12.	J. W. Gibson & Co., Chicago	1 car	B. grease	3½c	43
10, 13.	Cleveland Window Glass Co., Cleveland, O.	1 bbl.	V. glue	13c	44
10, 13.	Detroit Cabinet Co., Detroit, Mich	1 "	" "	13½c	45
"	Grand Rapids Refrg. Co., Grand Rapids, Mich.	2 "	" "	12½c	46
10, 14.	Heywood Bros. & Wakefield Co., Chicago.	5 "	" "	12c	47
10, 16.	Chase-Hackley Piano Co., Muskegon, Mich.	1 "	" "	12½c	48
10, 14.	Greek-American Conf., New York	10 "	" gel	19½c	49
10, 17.	John Widdicomb Co., Gd. Rapids	1 "	" glue	13½c	50
"	Ontario Wheel Co., Ltd., Gananoque, Ont.	1 "	" "	13½c	51
"	Canada Carriage Co., Brockville, Ont	1 "	" "	13½c	52
10, 19.	F. G. Smith, Leominster, Mass	2 "	" "	12½c	53
"	E. C. Stearns & Co., Syracuse, N. Y	1 "	" "	13½c	54
"	Whitney & Co., Leominster, Mass	1 "	" "	14½c	55
"	American Supply Co., Providence, R. I	1 "	" gel	18c	56
"	" " " "	1 "	" glue	16½c	56
10, 20.	Fuller & Hutsinpiller Co., Galapolis, Ohio.	1 "	" "	13½c	57
10, 21.	Dominion Licorice & Novelty Co., Toronto, Ont.	200 lbs.	V. gel	19c	58
10, 20.	James M. Aird, Montreal, Que	100 "	" "	18c	59
10, 21.	Wait Furn. Co., Portsmouth, O	2 bbls.	V. glue	13½c	60
10, 20.	Rockford Palace Furn. Co., Rockford, Ill.	1 "	" "	12½c	61
10, 20.	Rockford Standard Furn. Co., Rockford, Ill.	1 "	" "	12½c	62
"	East Rockford Mantel Co., Rockford, Ill.	1 "	" "	12½c	63
"	Forest City Furn. Co., Rockford, Ill	1 "	" "	12½c	64
"	Central Furn. Co., Rockford, Ill	1 "	" "	12½c	65
"	Royal Mantel & Furn. Co., Rockford, Ill.	1 "	" "	12½c	66
"	Scandia Furn. Co., Rockford, Ill.	1 "	" "	12½c	67
"	Rockford Frame & Fix. Co., Rockford, Ill.	1 "	" "	12½c	68
10, 21.	J. G. Phinney Counter Co., Stoughton, Mass.	1 "	" "	13½c	69
"	John G. Jewett Mfg. Co., Buffalo, N. Y.	1 "	" "	13½c	70
"	Liberty Wall Paper Co., Schuylerville, N. Y.	96 "	" "	13½c	71
10, 25	Heywood Bros. & Wakefield Co., Chicago.	5 "	" "	12c	72
"	Wells-Kreighbaum Mfg.Co., So. Bend, Ind.	1 "	" "	12½c	73
187					
10, 26.	W. J. Gibson & Co., Chicago	1 car	B. grease	3½c	74
10, 27.	Bird Glue Co., Cincinnati, O.	1 bbl.	V. glue	13c	75
"	Dayton Lum. & Mfg. Co., Dayton.	2 "	" "	12½c	76
"	Washington Mfg. Co., Washington, N. J.	1 "	" "	13½c	77

Exhibit 41—Continued.

Date. 1899.							Order No.
10, 27.	Wm. McWilliams, Quebec, Can	1	bbl.	V.	glue	19c	78
"	C. H. Fletcher Conf. Co., Sherbrooke, Que.	100	lbs.	V.	gel	19c	79
10, 28.	Martin Dawson Co., Chicago	1	bbl.	"	"	19c	80
10, 27.	Thomas I. Putnam & Son, New York	1	"	"	"	20c	81
"	" " " "	5	lbs.	"	"	20c	"
10, 30.	Myers & Ervien Co., Ogontz, Pa	3	bbl.	"	glue	13c	82
"	Palmer Bros., Chester, Pa	1	"	"	"	12½c	83
10, 31.	Smith, Day & Co., Baldwinville, Mass	1	"	"	"	12½c	84
"	Whitney & Co., Leominster, Mass	5	"	"	"	14½c	85
"	Wm. A. Berkey Furn. Co., Grand Rapids, Mich.	4	"	Jt.	"	13¾c	86
"	Anti-Kalsomine Co., Gd. Rapids, Mich	1	"	V.	"	12c	87
"	Toronto Type Fdy. Co., Toronto	2	"	"	"	15c	88
11, 2.	Ohio Table Co., Massillon, O	1	"	"	"	14c	89
"	W. H. Buchanan & Co., Chicago	"	"	"	"	20c	90
11, 3.	W. J. Gibson & Co., Chicago	"	car	B.	grease	3¾c	91
11, 4.	Stone & Ware, Milwaukee	"	bbl.	V.	glue	12½c	92
"	A. Geo. Schulz & Co., Milwaukee	"	"	"	"	12c	93
11, 6.	Heywood Bros. & Wakefield Co., Chicago	5	"	"	"	12c	94
11, 7.	W. C. Edwards & Co., Ottawa, Ont	1	"	"	"	13¾c	95
"	Conrey & Birely Table Co., Shelbyville, Ind.	1	"	"	"	15c	96
"	Conrey & Birely Table Co., Shelbyville, Ind.	2	"	"	"	12½c	"
"	Rockford Frame & Fixture Co., Rockford, Ill.	1	"	"	"	12½c	97
"	C. Rogers & Bros., Meriden, Conn	1	"	"	"	14½c	98
11, 9.	Indiana Furniture Co., Connersville, Ind.	1	"	"	"	13¼c	99
"	New England Furniture Co., Grand Rapids, Mich.	2	"	"	"	12½c	100
"	John Widdicomb Co., Gd. Rapids	2	"	"	"	13¼c	101
"	Oshkosh Furniture Co., Oshkosh, Wis	1	"	"	"	13¾c	102
"	" " " "	1	"	"	"	13¾c	"
"	Gd. Rapids Refrigerator Co., Grd. Rapids, Mich.	2	"	"	"	12¾c	103
"	Frankfort Chair Co., New Haven, Conn	5	"	"	"	13½c	104
"	" " " "	5	"	"	"	13½c	"
"	Sargeant & Co., " "	2	"	"	"	14c	105
11, 10.	Joseph Orr, Stratford, Ont	1	"	noodle	glue	13½c	106
11, 11.	W. J. Gibson & Co., Chicago	1	car	lgt.	grease	3¾c	107
11, 14.	" " " "	1	"	B.	"	3¾c	108
"	H. A. Eames & Co., Philadelphia, Pa	25	bbl.	V.	gel	18½c	109
11, 13.	Crescent Furniture Co., Evansville, Ind.	1	"	"	glue	12½c	110
11, 16.	Geo. E. Watson & Co., Chicago	2	"	"	gel	19c	111
"	Crossen Car Co., Coburg, Ont	2	"	"	glue	12½c	112
"	Wells, Kreighbaum Mfg. Co., So. Bend, Ind.	1	"	"	"	12½c	113
"	Keasey Pulley Co., Toledo, O	1	"	"	"	12c	114
188–203							
11, 17.	Wm. Paterson & Sons Co., Brantford, Ont.	1	bbl.	V.	gel	19c	115
"	North & Judd Mfg. Co., New Britain, Conn.	1	"	"	glue	13½c	116
"	Heywood Bros. & Wakefield Co., Chicago, Ill.	5	"	"	"	12c	117
"	D. H. Fritts & Co., Chicago	2	"	"	mldg.	15c	118
11, 18.	Hargreaves Mfg. Co., Detroit, Mich	5	"	"	glue	14c	119
11, 22.	F. W. Thurston & Co., Chicago	22	"	"	gel	18c	120
"	" " " "	13	"	"	glue	12½c	"
"	Reardon Mfg. Co., St. Louis, Mo	5	"	"	"	12½c	121
"	" " " "	10	"	"	"	12½c	"
"	Wellington Piano Case Co., Leominster, Mass.	1	"	"	"	13c	122

Exhibit 41—Continued.

Date. 1899.								Order No.
11, 22.	Page Belting Co., Concord, N. H.	1	bbl.	V.	gel.	20c.		123
"	Impervious Package Co., Keene, N. H.	1	"	"	glue.	13½c.		124
"	" " " "	1	"	"	"	12½c.		"
"	Swink, Snyder & Co., Wapakoneta, O.	1	"	"	"	12½c.		125
11, 24.	Schauss Bros. Mfg. Co., Toledo, O.	1	"	"	"	13½c.		126
"	Detroit Cabinet Co., Detroit	1	"	"	"	13¾c.		127
11, 25.	Heywood Bros. & Wakefield Co., Chicago, Ill.	5	"	"	"	12c.		128
11, 24.	Fulton Pulley Co., Fulton, N. Y.	1	"	"	"	15c.		129
11, 27.	Heywood Bros. & Wakefield Co., Gardner, Mass.	1	"	"	"	13½c.		130
"	Heywood Bros. & Wakefield Co., Gardner, Mass.	1	"	"	"	12½c.		"
11, 28.	H. M. Hooker, Chicago	5	bbl.	V.	gel.	19c.		131
11, 29.	Martin Dawson Co., Chicago	1	"	"	"	19c.		132
"	Harshaw, Fuller & Goodwin, Cleveland, O.	1	"	"	glue.	14c.		133
"	D. H. Fritts & Co., Chicago	10	"	"	mldg.	15c.		134
"	E. S. Kuh, New York, N. Y.	2	cars		grease	3¾c.		135
12, 1.	Fulton Pulley Co., Fulton, N. Y.	4	casks		sht. glue.	15c.		136
12, 5.	Wm. Ritter & Bros., Philadelphia, Pa.	1	bbl.	V.	glue.	13½c.		137
"	W. H. Buchanan & Co., Chicago	1	"	"	gel.	20c.		138
"	The Plano Mfg. Co., W. Pullman	1	"	"	glue.	15c.		139
"	R. E. Jamieson, Ottawa, Ont.	100	"	"	gel.	19c.		140
12, 13.	W. J. Gibson & Co., Chicago	1	car		grease	3¾c.		141

* * * * * * *

204 EXHIBIT 43.

Copy.

Diamond Glue Company letter-head.

3, 30, '99.

Mr. Fred Vogel, Jr., c/o Pfister & Vogel Leather Co., Milwaukee, Wis.

DEAR SIR: Yours of the 29th noted. We are sorry that our desire to place matters fairly before the U. S. Glue Co. should have caused you any dissatisfaction, because that was farthest from our wishes. We say today, just as Mr. Freshman has told you before, that your stock is worth more than the other tanners', but we are paying you the top market, and we are paying the other tanners too much. That is what we mean. We do not mean that we are paying the other tanners a fair price and you too little.

If you will look around carefully and thoroughly and get quotations on the stock, I think you will find that the price the tanners are going to charge the U. S. Glue Co. will be more than any one else will buy the stock for. I wish you would let me know just what others bid you. It would be no more than fair for us to know this, as all you want is to get the same from the glue company as others will pay.

We want you to make all the money you can, and that is what we are in business for, but we have a decided pride in looking forward to the U. S. Glue Co. making some money as an institution instead of making the tanners money by a first process that will deprive the

company earnings that we think it is entitled to. As written you before, when that Milwaukee plant starts we expect to take the yields of the various stocks of the different tanners, and it will be at that time that your stock, we think, will show its increased value over the others.

I understood yesterday from reliable sources that the American and Untermyer have stopped figuring for the time. The only thing on which they differed was $100,000. It is unnecessary for me to say that if that is the only thing in the road they will get together. This latter information please consider confidential.

(Signed) DIAMOND GLUE COMPANY.
J. R. MORRON, *Manager.*

205 EXHIBIT 44.

W. N. Eisendrath & Company letter-head.

CHICAGO, *April 21st*, 1898.

Sold to J. Spiegel & Co., of Chicago, Ills., all the glue stock, fleshings, trimmings, etc., which we may produce at our tanneries for the period of twelve months, commencing May 1st, 1898, and ending April 30th, 1899, at the following prices:

Limed or soaked calf-glue stock.....	45	cents	per	115 lbs.
" " " fleshings.....	45	"	"	115 "
Calf and kip salted trimmings.....	$1.50	"	"	100 "
Limed or soaked horse-glue stock.....	40	"	"	120 "
" " " fleshings.....	20	"	"	120 "
Horsebutt shavings.....	35	"	"	120 "
Horsebutt fleshings.....	20	"	"	120 "

(Signed) W. N. EISENDRATH & CO.,
Per W. N. EISENDRATH, *Pres.*

Accepted.

(Signed) J. SPIEGEL & CO.

206 EXHIBIT 45.

Comparative Statement Cost of Manufacturing Glue by the U. S. Glue Company, Period July 25–November 4, 1899, Inclusive.

	U. S. Glue Company's figures.			U. S. Glue Co. figures, eliminating $100 a day.			Stock at mkt. prices, eliminating $100 a day.		
	Yield.	Expense.	Cost.	Yield.	Expense.	Cost.	Yield.	Expense.	Cost.
Wk. end. 7, 29	15,365	2,857.25	.1866	15,365	2,357.25	.1534	15,365	1,668.25	.1460
8, 5	23,949	4,300.61	.1795	23,949	3,700.61	.1545	23,949	2,473.61	.1328
8, 12	16,130	2,900.35	.18	16,130	2,300.35	.1426	16,130	1,376.85	.859
8, 19	29,494	4,589.68	.1555	29,194	3,989.68	.1235	29,494	2,663.90	.937
8, 26	38,485	5,227.95	.1359	38,485	4,627.95	.1200	38,485	3,324.22	.864
9, 2	.....	1,560.76	.....	.....	960.76	.....	.....	960.76	.....
9, 9	.....	1,339.84	.....	.....	739.84	.....	.....	739.84	.....
9, 16	.....	1,691.01	.....	.....	1,091.01	.....	.....	1,091.01	.....
9, 23	49,794	8,157.51	.1638	49,794	7,557.51	.1518	49,794	5,469.71	.1086
9, 30	55,849	8,678.23	.1553	55,849	8,078.23	.1446	55,849	5,757.88	.1030
10, 7	66,734	8,904.67	.1340	66,734	8,304.67	.1244	66,734	5,929.14	.888
10, 14	65,041	8,974.26	.1379	65,041	8,374.26	.1287	65,041	5,825.25	.896
10, 21	68,053	8,539.41	.1254	68,053	7,939.41	.1166	68,053	6,004.70	.882
10, 28	17,751	3,075.92	.1732	17,751	2,475.92	.1394	17,751	1,959.30	.1103
11, 4	57,763	8,425.25	.1458	57,763	7,825.25	.1354	57,763	5,478.42	.948
	504,408	79,222.70	.1570	504,408	70,322.70	.1394	504,408	50,599.87	.1002
Less grease shipped.....	.....	.....			14,894.71	.0296			
	504,408				55,427.99	.1098			
Less grease shipped.....	..	.	...	....	....	.....		14,894.71	.0296
	.....	.....		....		504,408		35,705.16	.0707

Prices of Stock.

Fleshings	40c.
Trimmings	1¼c.
Horse fleshings	35c.
Calf trimmings	1½c.
Shavings	1c.

207 The above and foregoing testimony, including the exhibits therein mentioned and hereto attached and made a part of this bill of exceptions, was all the evidence given on the trial on behalf of the plaintiff, and no testimony was given on behalf of defendant except the stipulation marked Exhibit A, hereinafter referred to, and reading as follows:

It is hereby stipulated for the purposes of this action that the above-named plaintiff is and was, on the 25th day of June, A. D. 1898, an Illinois corporation, and that it has never filed or caused to be filed in the office of the secretary of state of the State of Wisconsin any authenticated copy of its charter, articles of association or incorporation.

Dated February 15, 1901.

BANCROFT & ADAMS AND
MILLER, NOYES & MILLER,
Plaintiff's Attorneys.
QUARLES, SPENCE & QUARLES,
Defendant's Attorneys.

208 DEFENDANT'S COUNSEL: I am a little in the dark about the practice. I would like, without resting our case, to move for a direction of a verdict.

Judge NOYES: Is that permissible?

COURT: It is permissible sometimes; if there is some good reason for it. There may be a crucial point in this case which you may want to present. I do not see that there is any new proposition raised at this time. You may present your motion. The jury will be excused until 2 o'clock.

DEFENDANT'S COUNSEL: We would move, then, that a verdict be directed for the defendant on the ground that the plaintiff has introduced no evidence to sustain a verdict or upon which a verdict can be rendered in its favor, because, as it appears conceded in the record by stipulation filed, the plaintiff is a foreign corporation which has never filed any copy of its articles with the secretary of state of the State of Wisconsin.

COURT: Does it appear they have not been filed with the secretary of state, or do you argue that from the fact there is no proof?

Judge NOYES: There is a stipulation in the record. That was stipulated as a matter of evidence which has not been offered in the case.

Mr. QUARLES: It is filed in the case, a stipulation by both parties in the case, and I apprehend that becomes a part of the record as a part of the pleadings.

COURT: You may make the motion in full and then I will pass upon it.

209 DEFENDANT'S COUNSEL: Second, on the ground that the contract sued upon contains a stipulation essential to it, which is in restraint of trade and in violation of the statutes of Wisconsin preventing combinations or arrangements to restrict production of any article which is an article of commerce in the State.

Third. That it appears by the plaintiff's own proof that as the agent of the defendant it has been disloyal, in that it has not diligently and properly attempted to sell the output of the plant, but has represented competing concerns, in violation of the duty assumed by it as the agent of the defendant.

Fourth. That it appears by the plaintiff's proof that the defendant has violated its agreement to refrain from the manufacture of hide and calf glue, in that after the execution of the contract with the defendant the plaintiff undertook and carried on the manufacture of hide and calf glue in an establishment in Gowanda, New York, whose output was greater than the total amount sold of this kind of glue by the plaintiff.

Fifth. That the contract of the plaintiff, if it is to be construed other than a contract to manufacture, is *ultra vires* of the plaintiff—that is, if the contract is to be construed as constituting the plaintiff a factor or sales agent only it is *ultra vires*.

Sixth. That it appears from the plaintiff's proof that it had failed before the first of December, 1899, to perform the conditions on its part to be performed, namely, the sale of the output or of a substantial part of the output of the factory of the defendant, and repudiated

its obligation to sell, or that it was bound to sell, or that any obligation rested upon it in the premises.

210 Which motion was resisted by counsel for the plaintiff. Their arguments presented to the court, among others, the following points and objections, to wit:

First. That the statute referred to and set out in the answer of the defendant was void and inoperative under section 10 of article 1 of the Constitution of the United States as a law impairing the obligation of the contract sued upon by the plaintiff.

Second. That the statute referred to and mentioned in the answer of the defendant was void and inoperative as an infringement of section 8 of article 1 of the Constitution of the United States, inasmuch as it attempted to regulate commerce among the several States, and was an infringement of the interstate-commerce law as undertaking to regulate the transaction of interstate commerce between said plaintiff and said defendant and between said plaintiff and other parties.

Third. That the statute referred to and set out in the defendant's answer was void and inoperative and contrary to the provisions of section 2, article 14, of the Constitution of the United States, providing that the citizens of each State should be entitled to all the privileges and immunities of citizens in the several States.

Thereupon, after argument of said motion by the counsel of the respective parties, the court said:

211 COURT: I am well satisfied of one proposition—that it would be both time and expenses expended to go on with the testimony for the defense, which would undoubtedly take as long as to put in that on the part of the plaintiff, with the views I entertain of the effect of that statute as applied to the evidence in this case. I fail to see anything in the evidence as now presented inconsistent with the terms of that contract as made by the parties. I think it is perfectly clear in the light of the evidence, as I think it is in the terms of the contract, just what was the understanding of these parties and the purpose of their engagement. The defendants, as tanners operating here in Milwaukee and vicinity, were ready to furnish the capital to take care of their by-products—manufacture them into glue. They had no experience in that line, and they entered into an arrangement with these parties who had the trade and experience. The reservations, as I remember them in that contract, are very clear—that the Diamond Glue Company was to have the naming of the manager or person who was to run the factory, they to have the control of the product as it came out. They had the dictation of the policy of the factory. Now, that, it seems to me, is as unmistakably the transaction of business as terms can make it. They were here operating in Wisconsin, and that, I think, brought them directly within the provisions of that statute. I can conceive no reason for evading compliance with the statute and am strongly inclined to think it was an oversight. If so, I should regret exceedingly the result which seems to "knock them over," as it were, upon a purely technical ground of a failure to comply. If they were de-

liberate in their action and intended to evade the statute I
212 think they should well be sent out on that ground. My view is that the statute was and is as completely operative and bars them from any performance of the contract on their part after the first of September, and, that being so, that the defendant was authorized to treat the contract as at an end and as terminated, and that there could be no suit for breach of the contract maintained. I have been through the trial and the examination quite strongly impressed with another view, and that is, of the showing of the doing of business by the plaintiff, notwithstanding the contract, with other parties, which, it seemed to me, would be a business necessarily in antagonism to that of the defendant's in this case, and, if so, that of itself would be a breach on their part which would authorize the setting aside of the contract by the defendant. The testimony in that regard entirely appears on the plaintiff's showing and is undisputed—the fact of the transaction with the Gowanda Company. I deem it proper to allude to it, but it would make no difference with my ruling. I am satisfied that on the introduction of the stipulation showing the fact that there was no filing of the articles I shall have to direct a verdict. I will therefore permit the defendant to introduce that and to then rest.

Defendant's counsel offers in evidence the stipulation and it is marked Defendant's Exhibit A.

Defendant rests.

COURT: In accordance with the views expressed I shall have to direct the jury to bring in a verdict for the defendant.

Exception by plaintiff.

Judge NOYES: I suppose, your honor, it may appear in any
213 bill of exceptions—that the facts may appear just as they have taken place here in regard to the motion that was made and the argument and proceedings.

COURT: Certainly; showing that the motion of the defendant was made before resting.

Judge NOYES: At the close of our testimony they made the motion and the argument was made.

COURT: That is right; it should appear in that form.

COURT: Gentlemen of the jury, in accordance with the views as expressed by the court, there is nothing left for your determination. This comes up as a question of law entirely, and the court takes the responsibility of direction, and does direct that the jury find the issues for the defendant. Such will be your verdict, and you are excused from further consideration of the case.

To which decision of said court and the instruction given by said court to the jury to find the issues herein for the defendant and to each and every part of the decision of said court made upon the hearing of the motion of the said defendant to direct a verdict herein the said plaintiff, by its attorneys, did then and there duly except upon the following grounds, to wit:

1. That the statute referred to and set out in the answer of the defendant was void and inoperative under section 10 of article 1 of

the Constitution of the United States as a law impairing the obligation of the contract sued upon by the plaintiff.

2. That the statute referred to and mentioned in the answer of said defendant was void and inoperative as contrary to and an infringement of section 8, article 1, of the Constitution of the
214 United States, inasmuch as it attempted to regulate commerce among the several States, and an infringement of the interstate-commerce law, and as undertaking to regulate the transaction of interstate commerce between said plaintiff and said defendant and between said plaintiff and the various parties with which it transacted and should transact business under the contract set out in the plaintiff's amended complaint.

3. That the statute referred to and set out in the defendant's answer was void and inoperative and contrary to the provisions of section 2, article 4, and also of the fourteenth amendment of the Constitution of the United States, providing that the citizens of each State shall be entitled to all the privileges and immunities of citizens in the several States, and that no State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States nor deny to any person within its jurisdiction the equal protection of the laws.

4. Because said court overruled and decided against the claims and rights of the plaintiff in deciding that the statute of Wisconsin set out and referred to in the defendant's answer was constitutional and valid, in that it did not attempt in anywise to regulate commerce between the several States or to regulate the business or transactions carried on by said plaintiff under and by virtue of the contract set forth in the plaintiff's amended complaint, and in that said statute did not in anywise impair the obligation of the contract entered into by and between the plaintiff and defendant set forth in the plaintiff's amended complaint, and in that the plaintiff under said statute was entitled to all privileges and immunities of citizens in the several States.

215 5. Because said court upon the trial of said action and upon granting the motion to direct a verdict for the defendant decided that the statute referred to and set out in the defendant's answer covered the contract and transactions thereunder set out in the amended complaint of the plaintiff herein, and such transactions under said contract as shown by the evidence adduced upon the trial came within the provisions of said statute and were prohibited thereby unless the plaintiff had first filed a duly authenticated copy of its articles of organization with the secretary of state of the State of Wisconsin.

Said plaintiff further excepts to the decision of said court and the instruction given to the jury to find the issues herein for the defendant upon the ground that the court should not upon the evidence have directed a verdict for the defendant, but should have submitted the case upon such evidence to the jury.

MILLER, NOYES & MILLER,
Plaintiff's Attorneys.

And thereupon the said plaintiff filed its motion to set aside the verdict and to grant a new trial herein, as follows:

Now comes the above-named plaintiff, by Miller, Noyes & Miller, its attorneys, and moves said court, upon the minutes of the judge thereof and during the same term of court, to set aside the verdict herein and grant a new trial for the reasons:

First. Because said verdict is contrary to the law.

Second. Because the verdict is contrary to the evidence.

Third. Because of the errors in the rulings of said court and the exceptions of the plaintiff thereto.

216 Fourth. Because said verdict should not have been directed by the court; that the case should have been submitted to the jury.

Fifth. Because said court upon the motion to direct the jury to find a verdict for the defendant herein overruled and denied the claims and rights of the plaintiff herein in the following respects, to wit:

(1.) That the statute referred to and set out in the answer of the defendant was void and inoperative under section 10 of article 1 of the Constitution of the United States as a law impairing the obligation of the contract sued upon by the plaintiff.

(2.) That the statute referred to and mentioned in the answer of said defendant was void and inoperative as contrary to and an infringement of section 8, article 1, of the Constitution of the United States, inasmuch as it attempted to regulate commerce among the several States, and an infringement of the interstate-commerce law, and as undertaking to regulate the transaction of interstate commerce between said plaintiff and said defendant and between said plaintiff and the various parties with which it transacted and should transact business under the contract set out in the plaintiff's amended complaint.

(3.) That the statute referred to and set out in the defendant's answer was void and inoperative and contrary to the provisions of section 2, article 4, and also of the fourteenth amendment of the Constitution of the United States, providing that the citizens of each State shall be entitled to all the privileges and immunities of citizens in the several States, and that no State shall make or enforce any law which shall abridge the privileges or immunities of citi-

217 zens of the United States nor deny to any person within its jurisdiction the equal protection of the laws.

Sixth. Because said court overruled and decided against the claims and rights of the plaintiff in deciding that the statute of Wisconsin set out and referred to in the defendant's answer was constitutional and valid, in that it did not attempt in anywise to regulate commerce between the several States or to regulate the business or transactions carried on by said plaintiff under and by virtue of the contract set forth in the plaintiff's amended complaint, and in that said statute did not in anywise impair the obligation of the contract entered into by and between the plaintiff and defendant, set forth in the plaintiff's amended complaint, and in that the

plaintiff, under said statute, was entitled to all privileges and immunities of citizens in the several States.

Seventh. Because said court, upon the trial of said action and upon granting the motion to direct a verdict for the defendant, decided that the statute referred to and set out in the defendant's answer covered the contract and transactions thereunder set out in the amended complaint of the plaintiff herein, and such transactions under said contract, as shown by the evidence adduced upon the trial, came within the provisions of said statute, and were prohibited thereby unless the plaintiff had first filed a duly authenticated copy of its articles of organization with the secretary of state of the State of Wisconsin.

MILLER, NOYES & MILLER,
Plaintiff's Attorneys.

Whereupon the court denied said motion to set aside the verdict and grant a new trial herein as follows:

218 The motion of the plaintiff to set aside the verdict herein and grant a new trial for the reasons specified in the written motion herein having come on to be heard, Messrs. Miller, Noyes & Miller appearing on behalf of the plaintiff and Messrs. Quarles, Spence & Quarles on behalf of the defendant, the court, upon consideration thereof, decides that said plaintiff is not entitled to have said verdict set aside and a new trial herein upon any of the grounds set forth in said motion, and expressly overrules the same, and thereupon denies said plaintiff's motion to set aside the verdict and grant a new trial herein.

Dated April 22d, 1901.

By the court:

WM. H. SEAMAN, *Judge.*

Whereupon said plaintiff duly excepted to the order of said court, overruling and denying its motion to set aside the verdict and grant a new trial herein, as follows:

Now comes the above-named plaintiff, by Miller, Noyes & Miller, its attorneys, and excepts to the order of said court overruling and denying its motion to set aside the verdict and to grant a new trial herein, upon the grounds stated in said written motion on file, and excepts to the order of said court deciding that the statute of the State of Wisconsin referred to and set out in the defendant's answer herein is constitutional and valid and not contrary to any of the provisions of the Constitution of the United States, and that such statute covered the contract and transactions set out in the plaintiff's amended complaint and the transactions disclosed by the evidence upon the trial herein, and that the plaintiff violated the pro-
219 visions of said statute in entering into the contract set forth in the amended complaint and in the transacting of the business disclosed upon the trial of said action.

Said plaintiff further excepts to the order denying its motion to set aside the verdict and grant a new trial herein, for the reason

that the court erred in directing a verdict for the defendant and erred in not submitting the case upon the evidence adduced to the jury for its determination.

MILLER, NOYES & MILLER,
Plaintiff's Attorneys.

And because the foregoing testimony, decisions, rulings, opinions, exceptions, and other proceedings do not appear of record herein, and the said plaintiff desires to make the same a matter of record and to have the same appear in a bill of exceptions herein, I, William H. Seaman, judge of said court, before whom said trial was held, do hereby certify that the above and foregoing was all the testimony adduced upon the trial herein, and that the above and foregoing testimony was taken, and that the rulings, decisions, opinions, exceptions, and other proceedings were duly had and taken, as appears in and by the above and foregoing bill of exceptions, and that the same are made part of the record herein, and that I have signed the same as constituting the bill of exceptions herein.

In witness whereof I have hereunto set my hand this 6th day of May, A. D. 1901.

(Signed) WM. H. SEAMAN, *Judge.*

220 MAY 11, 1901.

This day came the plaintiff, by its attorneys, and filed its assignment of errors and petition for writ of error, which are as follows:

Assignment of Errors.

Circuit Court of the United States for the Eastern District of Wisconsin.

DIAMOND GLUE COMPANY, Plaintiff in Error,
vs.
UNITED STATES GLUE COMPANY, Defendant in Error.

Afterward, to wit, on the 11th day of May, 1901, in this same term, comes the said plaintiff in error above named, by its counsel, George H. Noyes, and says that in the record and proceedings aforesaid there is manifest error, in this, to wit:

First. That the answer of the defendant in error and the matters therein contained are not sufficient in law for a defense to the action of said plaintiff in error against said defendant in error.

Second. That the judgment aforesaid given was given for the said United States Glue Company against the said Diamond Glue Company, whereas by the law of the land the said judgment ought to have been given for the said Diamond Glue Company against the said United States Glue Company.

Third. Said circuit court erred in holding that the certain statute of the State of Wisconsin described in the answer of the defendant

in error, being section 1770*b* of the Wisconsin Statutes of
221 1898, was sufficient in law for a defense to said action of said plaintiff in error.

Fourth. Said circuit court erred in holding that said statute of Wisconsin, to wit, said section 1770*b* of Wisconsin Statutes of 1898, applied to or covered the said contract between said plaintiff in error and said defendant in error.

Fifth. Said circuit court erred in holding that said section 1770*b* of the Wisconsin Statute- of 1898 applied to or covered the actions and transactions of said plaintiff in error under and in pursuance of said contract, as said contract and said actions and transactions appeared from the evidence upon the trial of said cause.

Sixth. Said circuit court erred in holding that said contract, as described in the complaint of the plaintiff in error, and the actions of the plaintiff in error under and in the performance of said contract, as the same appeared from the evidence, were in violation of and were contravened by the prohibition of said section 1770*b* of the Wisconsin Statutes of 1898.

Seventh. Said circuit court erred in refusing to hold that said statute of the State of Wisconsin referred — and set out in the answer of defendant in error was and is void and inoperative under section 10 of article 1 of the Constitution of the United States, as a law impairing the obligation of the contract sued upon by the plaintiff in error.

Eighth. Said circuit court erred in refusing to hold that the statute referred to and set out in the answer of the defendant was and is void and inoperative as to the plaintiff in error's said cause of
222 action, because contrary to and an infringement of section 8 of article 1 of the Constitution of the United States, inasmuch as the effect of said statute as applied by said circuit court to said plaintiff in error's cause of action, as shown by the evidence, was a regulation of or an attempt to regulate commerce between the several States, to wit, the interstate commerce between the said plaintiff in error and the defendant in error and between the said plaintiff in error and the various parties with whom it transacted and would have transacted interstate commerce under said contract.

Ninth. Said circuit court erred in refusing to hold the said statute referred to and set out in the answer of the defendant in error was void and inoperative as to the plaintiff in error's cause of action, as shown by the evidence, because the transactions between the said plaintiff in error and said defendant in error and between said plaintiff in error and the various parties with which it had transacted and would have transacted business under the terms of said contract set out in the plaintiff's amended complaint were interstate commerce.

Tenth. Said circuit court erred in refusing to hold that said statute referred to and set out in the defendant's answer was void and inoperative because contrary to the provisions of section 2, article 4, of the Constitution of the United States, providing that the citizens of each State shall be entitled to all the privileges and immunities of citizens in the several States.

Eleventh. Said circuit court erred in refusing to hold that said

statute referred to and set out in the defendant's answer was and is void and inoperative because contrary to the provisions of the
223 14th amendment of the Constitution of the United States, providing that no State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States nor deny to any person within its jurisdiction the equal protection of the law.

Twelfth. Said circuit court erred in holding against the claims and rights of said plaintiff in error that the said statute of Wisconsin, set out and referred to in the defendant's answer, was constitutional and valid because it did not attempt in anywise to regulate commerce between the several States or to regulate business or transactions carried on or to be carried on by said plaintiff in error under and by virtue of the contract set out in the amended complaint of the plaintiff in error, and because said statute did not in anywise impair the obligation of the contract entered into by and between plaintiff in error and the defendant in error set forth in the amended complaint of the plaintiff in error and shown by the evidence, and in that the plaintiff in error and all persons affected by said statute were entitled to all the privileges and immunities of citizens in the several States and in the State of Wisconsin.

Thirteenth. Said circuit court erred upon the trial of said action in granting the motion of the defendant and directing a verdict for the defendant.

Fourteenth. Said circuit court erred in refusing to hold upon defendant's motion for a peremptory instruction that the defendant by its acts and conduct in the premises, as shown by the evidence, had waived the right, if any it had, to set up said statute of Wisconsin as a defense to or excuse for the breach of said contract.

224 Fifteenth. Said circuit court erred in applying the provisions of the statute of Wisconsin, as set out and referred to in defendant's answer, said statute being no longer in force, as in said answer set out, at the time of the breach by the defendant of the contract sued on.

Sixteenth. Said circuit court erred in overruling the demurrer of the plaintiff in error to that part of the answer of the defendant in error purporting to allege as a defense the statute of the State of Wisconsin known as section 1770*b* of the Statutes of Wisconsin for the Year 1898.

Seventeenth. Said circuit court erred in permitting the counsel for the defendant in error to move for a direction of a verdict in favor of the defendant in error without first resting his cause.

Eighteenth. There is also error in this, to wit, that the court permitted counsel for defendant in error to argue a motion to direct a verdict after the testimony on behalf of the plaintiff in error was closed, and thereupon the court decided said motion in favor of defendant in error, and then permitted the defendant in error to introduce certain evidence, to wit, the stipulation in the bill of exceptions, marked "Defendant's Exhibit A," to the effect that the plaintiff in error was on the 25th day of June, 1898, an Illinois corporation, and that it had never filed or caused to be filed in the office of the

secretary of state of the State of Wisconsin any authenticated copy of its charter, articles of association or incorporation, and that upon filing such stipulation the court directed a verdict for the defendant.

225 Nineteen. There is also error in this, to wit, that the said court decided, against the claim and contention on the part of the defendant in error made upon the trial of the action, that section 1770*b* of the Statutes of Wisconsin for the Year 1898, set forth in the defendant's answer, was not in contravention of the Constitution of the United States or of any provision thereof.

Wherefore the plaintiff in error prays that the judgment of the United States circuit court for the eastern district of Wisconsin aforesaid may be reversed, annulled, and altogether held for nothing, and that said plaintiff in error may be restored to all things which it has lost by occasion of said judgment.

BANCROFT & ADAMS AND
MILLER, NOYES & MILLER,
Attorneys for Diamond Glue Company.

GEORGE H. NOYES, *Of Counsel.*

The aforesaid assignments of error were duly presented to me this 11th day of May, 1901, before allowing the said writ of error in said cause of even date.

(Signed) WM. H. SEAMAN,
District Judge.

Petition for Writ of Error.

United States Circuit Court, Eastern District of Wisconsin.

DIAMOND GLUE COMPANY, Plaintiff,
vs.
UNITED STATES GLUE COMPANY, Defendant.

The petition of the above-named plaintiff, Diamond Glue Company, herein respectfully shows:

226 That judgment was entered on the 22d day of April, 1901, that plaintiff take nothing by its writ, and that the defendant have and recover its costs against said plaintiff, the full record of which cause embracing the whole proceedings therein, including the bill of exceptions, now remains before said court, and that in said suit and final judgment there was involved the construction and application of the Constitution of the United States, and also the claim on the part of said plaintiff that a law of the State of Wisconsin was in contravention of the Constitution of the United States, and that upon the trial of said action it was claimed and contended on behalf of said plaintiff that the statute of the State of Wisconsin set out in the defendant's answer was void and inoperative under sections 8 and 10 of article 1 of the Constitution of the United States, and also under section 2 of article 4, and also the fourteenth amendment to the Constitution of the United States, all of which

said claims and contentions on the part of the said plaintiff were overruled and denied by said court and the decision of which said court was against the rights and claims so made on behalf of said plaintiff, all of which will more particularly appear in the record of said court and in the assignment of errors herewith presented and filed herein.

Wherefore your petitioner prays for a writ of error from the said circuit court of the United States for the eastern district of Wisconsin to the Supreme Court of the United States, to the end that such errors and all errors appearing of record, if any there be, may be corrected.

Dated this 11th day of May, 1901.

BANCROFT & ADAMS AND
MILLER, NOYES & MILLER,
Attorneys for Diamond Glue Company.

GEORGE H. NOYES, *Of Counsel.*

227 *Order.*

United States Circuit Court, Eastern District of Wisconsin.

DIAMOND GLUE COMPANY, Plaintiff,
vs.
UNITED STATES GLUE COMPANY, Defendant.

Upon motion of Miller, Noyes & Miller, attorneys for plaintiff, and upon filing a petition for a writ of error and an assignment of errors—

It is ordered that a writ of error be, and hereby is, allowed, to have reviewed in the United States Supreme Court the judgment heretofore entered herein, and that the amount of bond on said writ of error be, and hereby is, fixed at five hundred dollars ($500).

Dated May 11, 1901.

By the court:

(Signed) WM. H. SEAMAN, *Judge.*

228 And same day bond of the plaintiff, in the sum of five hundred dollars, with National Surety Company as surety, filed as follows:

Bond.

In Supreme Court of the United States.

DIAMOND GLUE COMPANY, Plaintiff in Error,
vs.
UNITED STATES GLUE COMPANY, Defendant in Error.

Know all men by these presents that we, Diamond Glue Company, a corporation organized under the laws of the State of Illinois, principal, and National Surety Company, a corporation organized under the laws of the State of New York, and authorized to do busi-

ness in the States of Wisconsin and Illinois, and to execute this bond as surety, are held and firmly bound unto the United States Glue Company, its successors and assigns, in the sum of five hundred dollars ($500), to be paid to said United States Glue Company, its successors and assigns; for which payment, well and truly to be made, we bind ourselves, our and each of our successors and assigns, jointly and severally, firmly by these presents.

Sealed with our seals and dated and executed this eighth day of May, A. D. 1901.

Whereas the above-named Diamond Glue Company hath prosecuted a writ of error to the United States circuit court for the eastern district of Wisconsin to reverse a judgment rendered in favor of said obligee against the said Diamond Glue Company in said court, directed to said court:

229 Now, therefore, the condition of this obligation is such that if the above-named Diamond Glue Company shall prosecute its said writ of error to effect and answer all damages and costs if it shall fail to make good its plea, then this obligation shall be void; otherwise the same shall remain in full force and virtue.

DIAMOND GLUE COMPANY,
[SEAL.] By JONAS SPIEGEL, *Its President.*
MILLER, NOYES & MILLER, *Its Attorneys.*

Attest: ARNOLD FRESHMAN, JR., *Sec'y.*

NATIONAL SURETY COMPANY, [SEAL.]
By ADAMS A. GOODRICH,
Its Resident Vice-President.
CYRUS W. GEORGE,
Resident Ass't Secretary.

I approve of the foregoing bond and of the sufficiency of the surety therein, and accept the same as good and sufficient security upon the writ of error in the foregoing entitled cause.

Dated May 11, 1901.

(Signed) WM. H. SEAMAN,
District Judge.

(Int. rev. stamp.)

Whereupon a writ of error and citation issued, returnable on the 10th day of June next, and a copy of said writ of error lodged, in pursuance of the statute, for the defendant in error.

230 UNITED STATES OF AMERICA, } ss:
Eastern District of Wisconsin, }

I, Edward Kurtz, clerk of the circuit court of the United States of America for the eastern district of Wisconsin, do hereby certify that I have compared the writings annexed to this certificate with their originals now on file and remaining of record in my office, and that they are true copies of such originals and correct transcripts therefrom, and that the same is a true copy of the record, bill

of exceptions, assignment of errors, and all proceedings in the case of Diamond Glue Company *vs.* United States Glue Company.

In testimony whereof I have hereunto set my hand and duly affixed the seal of the said court, at the city of Milwaukee, in said district, this 3rd day of June, in the year of our Lord one thousand nine hundred and one, and of the Independence of the United States the 125th.

Seal U. S. Circuit Court, Eastern District Wisconsin.

EDWARD KURTZ, *Clerk.*

{Ten-cent United States internal revenue stamp, canceled June 3, 1901. E. K.}

231 United States Circuit Court, Eastern District of Wisconsin.

DIAMOND GLUE COMPANY, Plaintiff,
vs.
UNITED STATES GLUE COMPANY, Defendant.

THE UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the judges of the United States circuit court for the eastern district of Wisconsin, Greeting:

Because in the record and proceedings, as also in the rendition of the final judgment of the circuit court of the United States for the eastern district of Wisconsin, the whole record in which is before you, between The Diamond Glue Company, plaintiff, and The United States Glue Company, defendant, wherein it was claimed that a statute of the State of Wisconsin was in contravention of the Constitution of the United States, and that the case involved the construction and application of the Constitution of the United States, and the judgment of said court, duly entered, was to the effect that the plaintiff take nothing by its said writ, and that the defendant have and recover its costs against the plaintiff, to the great
232 prejudice and damage of the said plaintiff, as is said and appears by the petition herein, we, being willing that error, if any hath been, should be fully corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the 10th day of June, 1901, in said Supreme Court, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause to be further done to correct those errors what of right and according to the laws and customs of the United States should be done.

Witness the Hon. Melville W. Fuller, Chief Justice of the said Supreme Court, this 11 day of May, 1901, and of the Independence of the United States the one hundred and twenty-fifth.

Attest my hand and the seal of the United States circuit court for the eastern district of Wisconsin, at the clerk's office, at Milwaukee, Wisconsin, on the day and year last above written.

[Seal U. S. Circuit Court, Eastern District Wisconsin.]

EDWARD KURTZ,
Clerk of the United States Circuit Court for the Eastern District of Wisconsin.

233 Allowed by me this 11th day of May, A. D. 1901.

WM. H. SEAMAN,
District Judge.

233½ [Endorsed:] U. S. circuit court, E. dist. of Wisconsin. Diamond Glue Company *v.* United States Glue Company. Writ. Original. Filed May 11, 1901. Edw. Kurtz, clerk. Miller, Noyes, Miller & Wahl.

234 United States Circuit Court, Eastern District of Wisconsin.

DIAMOND GLUE COMPANY, Plaintiff,
vs.
UNITED STATES GLUE COMPANY, Defendant.

The United States of America to the said defendant, United States Glue Company, Greeting:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States, to be holden at Washington, on the 10th day of June, A. D. 1901, next, pursuant to a writ of error filed in the office of the clerk of the circuit court of the United States for the eastern district of Wisconsin, at the office of the clerk of said court, in the city of Milwaukee, in the said State of Wisconsin, wherein The Diamond Glue Company is plaintiff in error and you are defendant in error, to show cause, if any there be, why the final judgment against the said plaintiff in error, as in said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Hon. William H. Seaman, judge of the United States circuit court for the eastern district of Wisconsin, at Mil-
235 waukee, Wisconsin, this 11 day of May, in the year of our Lord one thousand nine hundred and one.

WM. H. SEAMAN,
District Judge.

We hereby accept service of the above citation this 11th day of May, 1901.

QUARLES, SPENCE & QUARLES,
Defendant's Attorneys.

235½ [Endorsed:] U. S. circuit court, E. dist. of Wisconsin. Diamond Glue Company *v.* United States Glue Company. Citation. Original. Miller, Noyes, Miller & Wahl.

236 In the Supreme Court of the United States.

DIAMOND GLUE COMPANY, Plaintiff in Error,
vs.
UNITED STATES GLUE COMPANY, Defendant in Error.

It is hereby stipulated by and between the parties hereto that the clerk of said court may omit printing from the record herein the following pages thereof, to wit:

In Exhibit 1, pages 129 to 132, inclusive, and page 134.

Exhibit 42, being all of pages 189 to 203, inclusive.

Dated June 26, 1901.

GEO. H. NOYES,
Counsel for Plaintiff in Error.
J. V. QUARLES &
GEO. LINES,
By CHAS. QUARLES,
Counsel for Defendant in Error.

237 [Endorsed:] In Supreme Court of the United States. Diamond Glue Company *v.* U. S. Glue Company. Stipulation. Original. Miller, Noyes, Miller & Wahl, 102 Wisconsin street, Milwaukee, Wis.

238 [Endorsed:] File No., 18,202. Supreme Court U. S., October term, 1901. Term No., 349. The Diamond Glue Company, P. E., *vs.* The United States Glue Company. Stipulation to omit parts of record in printing. Filed June 29, 1901.

Endorsed on cover: File No., 18,202. E. Wisconsin C. C. U. S. Term No., 349. The Diamond Glue Company, plaintiff in error, *vs.* The United States Glue Company. Filed June 14, 1901.

Office Supreme Court U. S.
FILED
NOV 7 1902
JAMES H. McKENNEY,
Clerk.

No. 119.

Brief of Noyes for P. C.

GEN. NO. 18202. TERM NO. 119.

Filed Nov. 7, 1902.

IN THE

Supreme Court of the United States.

OCTOBER TERM, A. D. 1902.

THE DIAMOND GLUE COMPANY,
Plaintiff in Error,

vs

THE UNITED STATES GLUE COMPANY,
Defendant in Error.

In Error to the Circuit Court of the United States for the Eastern District of Wisconsin.

BRIEF.

EDGAR A. BANCROFT,
SAMUEL ADAMS,
Attorneys for Plaintiff in Error.

FRANKLIN D. LOCKE,
GEORGE H. NOYES,
Of Counsel.

The Gunthorp-Warren Printing Company, 116-118 Randolph St., Chicago.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1902.

THE DIAMOND GLUE COMPANY, *Plaintiff in Error,* vs THE UNITED STATES GLUE COMPANY, *Defendant in Error.*	In Error to the Circuit Court of the United States for the Eastern District of Wisconsin.

STATEMENT OF THE CASE.

This is a writ of error to the United States Circuit Court for the Southern District of Wisconsin, to review a judgment rendered in favor of the defendant in a suit brought by the Diamond Glue Company, an Illinois corporation, against the United States Glue Company, a Wisconsin corporation, with its principal place of business in the City of Milwaukee. The suit was brought for the breach of a contract, which is set out in the printed record, as Exhibit "3a" on page 75, and was made under the following circumstances:

In June, 1898, and for some time previous there were lo-

cated in and near Milwaukee a number of tanneries, which produced a large amount of glue stock, consisting of "trimmings" from hides that were tanned, and of "fleshings" or scrapings from the inside of the hides. This glue stock the Milwaukee tanners had been accustomed to ship to Chicago and other points for sale to the owners of glue factories. They conceived the idea that it would be to their advantage to organize a glue company and to establish a factory in or near Milwaukee for the manufacture of glue from these "fleshings" and "trimmings" with the purpose, doubtless, of influencing the market for such glue stock, as well as saving the freight on the shipments to Chicago. The United States Glue Company, a Wisconsin corporation, was organized by these Milwaukee tanners for the manufacture of glue from their glue stock. Fred Vogel was President and Albert O. Trostel was Vice-President.

The organizers and members of the United States Glue Company had had no experience in the manufacture or sale of glue, and they, therefore, naturally looked around for advice and assistance. Their representatives talked with officers of the plaintiff, the Diamond Glue Company, with a view to securing the services of the plaintiff company in assisting to launch the new enterprise and in disposing of its product. This was in June, 1898.

The Diamond Glue Company was a corporation of the State of Illinois, with its principal office in Chicago, organized in 1894 by Jonas Spiegel, John R. Morron and Arnold Freshman, who were respectively its president, vice-president and secretary and treasurer. It operated factories in Chicago, Kansas City, Mo., and in Madison, Ind., and in addition sold a large amount of glue for other people, amounting in 1898 to five or six million pounds a year. Its officers were men whose lives had been spent in manufactur-

ing and dealing in glue, and the company was well able to furnish just the sort of assistance that the United States Glue Company required.

It was natural, therefore, that the United States Glue Company should have made overtures to the Diamond Glue Company to secure their aid both in establishing their factory and in disposing of their product. In consequence, on June 22nd, 1898, the United States Glue Company wrote to the Diamond Glue Company (Rec., p. 74), proposing the making of a contract for five years and sending a synopsis of what that contract was to contain.

This proposition was incorporated in a contract made and dated June 25th, 1898, except that the provision in the United States Glue Company's proposition that the Diamond Glue Company should refrain from "making *or handling* either calf or hide glue" was changed to an agreement that the Diamond Glue Company should not manufacture hide or calf glue.

The contract, dated June 25th, 1898 (Rec., p. 75), was between the plaintiff and the defendant. The United States Glue Company, the defendant, agreed thereby to erect, equip and complete a glue factory on a site to be afterwards selected. The Diamond Glue Company agreed to advise and plan with the United States Glue Company's architect, and oversee and supervise the plans of the factory, and give the United States Glue Company the benefit of its labor-saving devices, and their knowledge and experience in the manufacture of glue.

The site for the factory was to be selected within sixty days by the United States Glue Company, and the factory was to be begun and completed with the least possible delay. It was agreed that the Diamond Glue Company should have

"the management of the manufacturing in the said factory," should furnish a superintendent, to whom the United States Glue Company should pay not more than $150 a month; that the officers of the Diamond Glue Company should give "such factory such personal supervision as may be necessary from time to time in the operation of the same, and said officers will give party of the first part in the management and operation of the said factory the benefit of their experience and knowledge."

The contract further provides that the Diamond Glue Company "shall control, handle and sell the entire output, including the glue and by-products of said factory;" that the products should be billed as those of the United States Glue Company; that the Diamond Glue Company, as soon as the factory was in operation, should refrain from manufacturing hide or calf glue in any of its factories, and should guarantee the payment of accounts on any sales made by or through it. It was further agreed that the Diamond Glue Company should receive a commission of 10 per cent. on all sales of glue or by-products, as well as a further small contingent interest in any profits above the stated dividends and amounts for depreciation. As the stockholders were to furnish the new materials, the contract provided that the United States Glue Company should pay a fair market price therefor. The contract was to run for five years.

Immediately upon the execution of this contract the parties set about its performance. The officers of the Diamond Glue Company met the officers of the United States Glue Company at Milwaukee, and together they looked over several sites for the factory, and one was selected early in July, 1898. Even before that the Diamond Glue Company had had some plans drawn, and when Mr. Morron, Mr. Freshman and Mr. Morehead, then with the Diamond Glue Company,

went up to Milwaukee, they took these sketches with them and there met Mr. Finkler, the architect employed by the United States Glue Company. Mr. Finkler and Mr. Bossert, the mechanical engineer of the United States Glue Company, two or three days after this went to Chicago and were shown over the Diamond Glue Company's factory there. Some alterations were made in the sketches and they were completed, and as soon as complete were turned over to the architect, probably in July, for there is a letter (Rec., p. 77) from Mr. Morron, written July 27th, 1898, asking, "Are the specifications for the factory nearly ready?" These facts appear mainly in Mr. Morron's testimony and that of Mr. Morehead. (Rec., pp. 31-60.)

The factory was made unnecessarily large because the Milwaukee tanners made a mistake as to the amount of glue stock they would be able to furnish. (Rec., pp. 54, 56, 61 and 62.) The United States Glue Company's engineer refused to put in sufficient power. (Rec., pp. 58 and 61.) There were unexpected delays by the builders in furnishing material and getting it under way; also on account of excessive amount of rain in the fall of 1898, and excessive cold in the following winter. (Rec., p. 62.) So that the factory was not ready until July 1st, 1899, instead of January 1st, as had been expected. Meanwhile, a lot of glue stock was sent by the Milwaukee tanners to the factory, a good deal of it perishable, and this had to be stored. In storage it necessarily deteriorated. In addition to this, the glue stock was bought at prices above the market because the people who sold it controlled the buying corporation. (Rec., pp. 57, 78, 79, 88.)

All these facts conspired to make the cost of the products of the factory in its early operation much greater than was expected, and served, perhaps, to explain, although not to

excuse, the attitude of the United States Glue Company. The plan of the Milwaukee tanners to use up their own glue stock encountered these obstacles at the start, and so was not as successful financially as expected and they were disappointed. They saw that the Diamond Glue Company was likely to make some money out of selling the glue and had already made some money in selling the grease, a by-product: therefore, they sought to put the blame of their lack of success upon the Diamond Glue Company, thinking both to excuse themselves and to drive a better bargain with the same company or another.

About August 1, 1898, the Diamond Glue Company, in fulfillment of its contract, sent a competent superintendent, Mr. Morehead, up to Milwaukee, to enter the service of the United States Glue Company. From that time until September 1, 1899, when he was succeeded by Mr. Harden, another superintendent sent by the Diamond Glue Company, he remained in the service of the United States Glue Company alone, was paid by it and by no one else, and received his orders solely from the United States Glue Company, although consulting the officers of the Diamond Glue Company from time to time. (Rec., pp. 54, 62, 65.) Early in July, 1899, when the factory was about ready to start up, the Diamond Glue Company sent up their superintendent, Mr. Harden, for a few days to assist Mr. Morehead in starting the work of manufacture. (See Exhibits 12 and 13, Rec., p. 82.) The factory was at all times operated under the direction of the officers of the United States Glue Company, although officers of the Diamond Glue Company occasionally made short trips from Chicago to the factory, which was just outside of Milwaukee, for the purpose of giving advice and assistance. They, however, did not exercise or attempt to exercise any authority over the fac-

tory or any of its operatives. The workmen were employed, paid and discharged by the officers of the United States Glue Company. (Rec., pp. 57, 58 and 65.) An employe of the United States Glue Company kept the books at the factory, and although the Diamond Glue Company's cashier went to the factory for the purpose of making suggestions as to the best method of keeping the books, he had no authority over them and many of his suggestions were not followed. (Rec., p. 69.) This situation was accepted by both companies without question, and both companies assumed that this was according to the contract. The United States Glue Company never asked that the Diamond Glue Company assume control of the factory, nor did the Diamond Glue Company attempt so to assume control. The connection of the two companies after the completion of the factory, and, indeed, during its building, was simply that the Diamond Glue Company did everything it could in the way of furnishing advice, occasionally sending its men up to see how things were getting on at the factory, drawing up plans, etc. The Diamond Glue Company had no one at the factory in its employ, it owned nothing there, kept no books there, nor did any of the raw material, machinery, or finished products belong to it, nor had it any voice in fixing the prices paid for material.

The factory was completed at the end of July or early in August, 1899, and it was immediately put into operation by the United States Glue Company. Its estimated capacity was 3,000,000 pounds of glue and a by-product of grease of about 1,000,000 pounds per year. The Diamond Glue Company received samples of the first lot of glue and grease about the middle of August, and immediately began systematically to seek purchasers for the product. The time was unfavorable for selling a large quantity of glue because the

large consumers usually made contracts covering a year's supply about the beginning of the calendar year (Rec., p. 43), so that the main work—almost the only work, at first—that could be done by the Diamond Glue Company before winter set in, was in selling sample barrels to different consumers of glue who would be in the market toward the end of the year for the next year's supply.

Two methods were open to the Diamond Glue Company for introducing this glue; one was to strictly maintain the prices and gradually and slowly introduce the product. The other was to cut under the prevailing prices for similar qualities of glue in order to more widely and more quickly advertise the product of the United States Glue Company's factory. It was the judgment of the Diamond Glue Company that the former was the best method and this method was afterward insisted upon by the United States Glue Company when, in answering its complaints, the Diamond Glue Company proposed to offer the product at prices which would enable it to dispose of the glue quickly. (Exhibit 25; Rec., p. 91.)

The experience of the Diamond Glue Company, one of the things for which the United States Glue Company expressly bargained, taught its officers that these sample lots of glue were certain to be followed, in many cases, by other orders for large quantities, and at the very time when the United States Glue Company chose to renounce the obligations of its contract, this work of the Diamond Glue Company was beginning to bear fruit. (Rec., p. 99.) Selling these sample lots of the product of a new factory was of course slow and difficult work, compared to the work of selling the product of the same factory after its glue was generally known to consumers. Naturally and necessarily, therefore, the production of the factory outran the sales, and toward

the end of September complaint was made by the United States Glue Company that the glue was accumulating at the factory. (Exhibit 21; Rec., p. 87.) Yet, when it was reminded of the obvious fact that the glue could not be sold at the top of the market and at the same time be sold rapidly, President Vogel answered, on October 28, 1899: "We prefer to hold our stock for fair prices." (Rec., p. 91.) October 14, 1899, Vice-President Trostel complained that the factory had made about 320,000 pounds of glue and only 94,000 pounds had been sold. To which the Diamond Glue Company answered that it was doing all that was possible to sell the glue at the highest market price. It was plainly apparent from correspondence at that time that the United States Glue Company was seeking for a pretext to break its contract, now that there began to be a chance for the Diamond Glue Company to receive its share of the benefits provided in the contract. (Rec., pp. 87 to 102.) Up to this time the Diamond Glue Company had performed a large part of its obligations under the contract, and had received no compensation whatever. It had outlined for the United States Glue Company's architect the plans from which the factory was built and had assisted him in the preparation of plans and specifications; it had advised in the selection of a site, mapped out the arrangement of the equipment, and given constant advice to the officers in the purchase and installation of the equipmnet, and had told them where and how various supplies needed for the glue factory could be best purchased; it had furnished a superintendent, and had sent its bookkeeper to advise in the opening of the factory books.

This advantage the United States Company had obtained; and, in case it was able to find an excuse for breaking the contract, it would have obtained this advantage without

giving anything in return. At least as early as November 1st, the United States Glue Company asked the Diamond Glue Company to release them from the contract, for on November 3rd Mr. Morron wrote to Mr. Vogel, president of the United States Glue Company (Exhibit 26; Rec., p. 91), suggesting on what terms they might be willing to abrogate the contract, and referring to a conversation had with Mr. Vogel some days previous. The receipt of this letter was acknowledged November 15th by the United States Glue Company (Exhibit 26a; Rec., p. 93), and November 16th the Diamond Glue Company offered to take from 100,000 to 200,000 pounds of the "off lots of glue" to reduce the United States Glue Company's stock. (Exhibit 27; Rec., p. 94.)

November 18th Mr. Vogel writes in regard to the contract (Exhibit 28; Rec., pp. 94, 95), that he is waiting for a quorum of the board of directors, stating that as long as the Diamond Glue Company is able to sell the grease, they ought to keep selling the glue at a fair price, and asking for an offer on off-lots of glue. The Diamond Glue Company replied to this letter on the 20th of November (Exhibit 28a; Rec., p. 95), stating that the grease is sold to brokers, and is, therefore, very easily disposed of, and offering to take 375 barrels of glue, to reduce the United States Glue Company's stock, at 12½ cents a pound, less commission.

The same day, so that the letters must have crossed, the United States Glue Company wrote to the Diamond Glue Company in answer to the letter of November 3rd (Exhibit 29; Rec., pp. 96, 97), stating that they are not endeavoring to cancel the contract in order to enter into an arrangement "more profitable or more beneficial to themselves," (though

it is hard to see what other object they could have had) and implying that even if this contract is abrogated, *another contract might be made with the Diamond Glue Company.* (Page 96.) The letter recites that only 22% of the glue made had been sold, complains that the manufacturing cost was greater than was represented by the Diamond Glue Company, and says that unless this difficulty was remedied the works would have to close, and therefore, the United States Glue Company had only a choice of having the factory closed or the contract ended. The latter contained no definite answer to Mr. Morron's letter of the 3rd. (Page 91.) On November 25th the United States Glue Company rejected the offer of the Diamond Glue Company to buy 375 barrels of glue.

November 27th the Diamond Glue Company sent in their usual method (Exh. 32a, Rec., p. 99) to the United States Glue Company several orders, one for 100 to 125 barrels, one for five barrels each month, with the privilege of increasing to twelve barrels after January 1st, 1900, for a year; one for 60 to 75 barrels to be taken in monthly shipments during 1900, as well as two small orders, in all between 227 and 346 barrels. These orders were obtained by the Diamond Glue Company as sales agent for the United States Glue Company.

The next day, November 28, the United States Glue Company replied (Exh. 33, Rec., pp. 99, 100), declining to recognize the contracts for future delivery on the ground that the continuance of the contract was uncertain. The letter ends with a definite request that until further arrangements the Diamond Glue Company should cease selling the United States Glue Company's products.

A further letter of December 2nd (Exh. 34, Rec., p. 100) acknowledges certain orders sent in by the Diamond Glue

Company, states a willingness to fill them and allow a 10 per cent. commission, etc., and states that the United States Glue Company "will be pleased to receive orders from you and allow the same commission until further notice on such orders as seem to be proper to be filled," repeating the request that the Diamond Glue Company cease to make sales for future delivery, and stating that the agreemnt is at an end, and that the United States Glue Company cannot recognize any orders as coming within or being governed by the agreement. On December 4th, 1899, the United States Glue Company offered to pay $5,000 as a settlement of the matter. (Exh. 35, Rec., pp. 100, 101.) On December 5th, the Diamond Glue Company wrote (Exh. 36, Rec., p. 101):

"This company denies your right to do this, and insists that you cannot thus arbitrarily terminate it merely because you desire more favorable terms than we both agreed to when the contract was made.

"Before deciding what action to take with reference to your offer, we would like to know what you mean by your claim that we are guilty of 'various breaches of the said contract.' We have kept our agreement in good faith, and if we are to be deprived of its benefits we ought to be notified explicitly of the reasons for the action." (Exh. 36, Rec., p. 101.)

On December 7th the United States Glue Company replied (Exh. 37, Rec., pp. 101, 102):

"You suggest, as you have suggested before, that our action is arbitrary and based simply on a desire to secure more favorable terms than were agreed upon when the contract was made. We again state to you, as we have before stated, that this action on our part is not arbitrary, nor is it based on any desire to secure more favorable terms. Our action is, in our judgment, based on good and sufficient legal grounds, and, among other reasons, goes upon breaches of the contract by you and failure on your part to perform."

February 5th, 1900, the Diamond Glue Company brought its action against the United States Glue Company in the

United States Circuit Court for the Eastern District of Wisconsin. A complaint was filed which was afterward amended. The allegations of the amended complaint (Rec., p. 22) are in substance as follows:

That the Diamond Glue Company is an Illinois corporation with its principal offices in Chicago, and the United States Glue Company a Wisconsin corporation with its principal offices in Milwaukee, in the Eastern District of Wisconsin.

That on and prior to June 25th, 1898, the Diamond Glue Company was engaged in manufacturing, buying, selling and dealing in glue and by-products; that it had factories in Illinois, Indiana and Missouri, and that it had branch offices for carrying on its business in New York, Boston, Philadelphia, Toronto and other places, and that it was extensively engaged in the manufacture of glue and by-products and the sale of same, both from its own factory and from the factory of others in the various parts of the United States; all of which was known to the defendant and its officers.

That the Diamond Glue Company at that time had had large experience in the construction and operation of factories for the manufacture of glue and the supervision and management of the same, and that its officers then possessed knowledge and experience in the construction and management of such factories, and in the sale and disposal of their products, and also in selling raw material for their manufacture, and that it possessed large facilities for selling and disposing of glue.

That the defendant had been organized for the purpose of buying from the various tanners in and around Milwaukee the glue stock turned out by said tanners and manufacturing said glue stock into glue in a factory to be erected in or near Milwaukee, and that the defendant made contracts with nearly all the tanners in Milwaukee to take and pay for all their glue stock for a period of at least five years from the date of the construction of the defendant's factory; that the sole object of the organization of the defendant was to enable the Milwaukee tanners to dispose of their glue stock to a corporation controlled by themselves and

that all the capital stock of the defendant was held by Milwaukee tanners.

That on June 25th, 1898, the contract above set forth was made between the plaintiff and defendant; that after the making of said contract the defendant selected a site for its glue factory near Milwaukee and proceeded to erect and equip the factory, and that the plaintiff advised and planned with the defendant's architect and supervised the plans of the factory so as to secure economy of space and give the defendant the benefit of all the plaintiff's labor-saving devices, as well as of the knowledge and experience it had acquired in the manufacture of glue; that said factory was put into operation about July 25th, 1899, and the plaintiff immediately refrained and has at all times since refrained from manufacturing hide or calf glue at any of its factories that it had refitted one of them for the manufacture of other kinds of glue, and leased it to other parties; that the plaintiff had at all times been ready and willing to perform the terms and conditions of the contract and had in all respects fully complied with said terms and conditions to be performed on its part.

That the defendant, upon the completion of the factory, entered into the management of the manufacturing therein and operated the same, and that plaintiff furnished a capable superintendent, according to the contract, whose salary was paid by the defendant, and that plaintiff, through its officers, at all times gave defendant in the operation of the factory until the breach of the contract the benefit of its experience and knowledge, and that of its officers; that as soon as any were made the plaintiff sold all the glue and by-products of said factory which it was able to dispose of until said breach; and that all such products were sold as the defendant's product, but were stamped "Diamond Glue Company, exclusive sale agents." That all such sales were made by the plaintiff outside of the State of Wisconsin, and that the shipments of the product of the factory were made by the defendant, less than one per cent. of such shipments being made to places in the State of Wisconsin.

That the defendant in many cases refused to accept the prices obtained by, or offered by the plaintiff for the sale of such glue and by-products, and asserted the right to refuse to carry out sales made by the plaintiff in case the defend-

ant's officers did not think the price high enough, and in many cases actually did so refuse.

That the contract was continuously recognized by the defendant as a binding contract until about November 20th, 1899, when the defendant, claiming that the plaintiff had agreed to sell defendant's entire output and that it had failed to do so, asserted a right to treat the contract as at an end, and about November 28th, 1899, requested the plaintiff to cease selling its product, and December 2nd, 1899, definitely stated to plaintiff that the contract was at an end and refused to be further bound thereby.

That there is due and owing to the plaintiff from the defendant $1,698.48 on account of commissions on sales under the contract.

That the services done by the plaintiff to the defendant in planning, overseeing and supervising the construction of the factory and in giving the defendant the benefit of its labor-saving devices and its knowledge and experience were of very great value to defendant; that plaintiff sustained great loss in closing down its factories in the manufacture of hide and calf glue and in procuring customers for the defendant and refraining from the manufacture of hide and calf glue, for none of which it had been paid.

That the output of said factory would amount to at least 3,000,000 pounds of glue and 1,500,000 pounds of grease a year, and that the plaintiff has been deprived of its commissions in the selling of this product, to the plaintiff's damage in the sum of $200,000.

The answer of the United States Glue Company (Rec., p. 7), was to the following effect:

It admits the making of the contract and sets it out in full. Denies that the plaintiff was authorized by its charter to superintend the construction of the factory or to act as broker, factor or sales agent or to make or carry out the contract.

Alleges that defendant prior to the first day of September, 1898, transacted no business except with its own members, except partially planning the factory, and making certain contracts relating thereto. And alleges that all the acts done by the plaintiff under the contract were done by it after September, 1898, and that it, the plaintiff, has not

complied with Section 1770b of the Revised Statutes of Wisconsin, and that, therefore, all the acts done by the plaintiff were done in violation of the laws of Wisconsin and the contract was wholly void on behalf of the plaintiff.

Alleges that the plaintiff induced defendant to enter into said contract and represented that defendant would be able to manufacture glue at a maximum cost of 2½ cents per pound, and that this was on account of the plaintiff's wide experience, etc.

Admits that the defendant was organized by the tanners for the purposes alleged in the complaint.

Alleges that the said plaintiff has never been able to make the factory produce glue at a manufacturing cost of less than 3½ cents per pound, and that this arises, either because the representations of plaintiff were false or because an incapable superintendent was furnished the defendant, or from negligence of the plaintiff in planning and equipping the factory.

Alleges that plaintiff improperly and insufficiently planned and equipped the factory so that much glue-stock was lost and the glue, when manufactured, was of less value than it otherwise would have been.

Alleges that up to December 1, 1899, plaintiff "unmindful of the obligation which it had assumed to sell the entire output of the factory," failed and refused to sell more than 19% of the output of glue and that plaintiff was powerless to sell any larger proportion then, or in the future; that plaintiff was engaged in selling the glue from other factories owned or controlled by it, and sold such output to the neglect of the defendant's output in violation of the contract, and refrained from attempting to sell defendant's output and betrayed and neglected defendant's interests and subordinated them to adverse interests in favor of plaintiff and used defendant's output for the purpose of manipulating the market for plaintiff's profit, and neglected to perform its duty as defendant's sales agent.

Alleges that plaintiff so managed the manufacture and sale of the product that a constant loss was imposed upon the defendant. That the cost of manufacture was greater than it should have been. That the prices obtained by the plaintiff were uniformly under the market price and below

actual cost. That every day the plaintiff continued in control of said factory and its products great money loss was entailed upon the defendant because plaintiff was selling the product at less than the cost of production.

Admits that about December 1, 1899, defendant notified plaintiff it no longer recognized the existence of the contract.

Denies that it ever refused to recognize sales made by the plaintiff but alleges that it refused to sell its product direct to the plaintiff.

Denies that plaintiff closed its factories or fitted any of them for the manufacture of other kinds of glue. Alleges that it leased one of its factories and through its tenants continued to manufacture a mixed glue and control the output of said factories, composed of hide glue and bone, and alleges that plaintiff made a contract with the Gaenzlein & Fischer Glue Company, of Gowanda, New York, to take the factory of said company and said plaintiff manufactured hide and calf glue and subordinated the interests of the defendant to those of the plaintiff.

Admits that the unpaid commissions not yet due amount to $1,639.13. Denies that plaintiff has suffered any loss from the breaking of the contract.

Denies that the factory would have produced any amount of glue or grease if the agreement had continued in force, and alleges that the commissions provided for in said agreement would have been consumed in the expenses attending the making of sales.

The defendant added to its answer counter claims amounting to sixty thousand dollars; to which a reply was filed by the plaintiff. The counter claims were not considered at the trial.

The case came on for trial at Milwaukee, before the Honorable WILLIAM H. SEAMAN, Dist. Judge, in February, 1901.

The plaintiff's testimony showed a compliance by it with the terms of the contract; that it had, immediately upon the beginning of the manufacture of glue in the defendant's

factory, sent samples of the glue to its traveling salesmen and put its machinery in motion to find a market for the glue; that it had sold, in sales of a few barrels apiece; a large amount of the glue, and that just before the termination of the contract by the defendant the plaintiff had begun to get in large orders for quantities of 100 barrels, or thereabouts, to be delivered at various times during the ensuing year (see Exhibit 32a; Rec., p. 99), so that the prospect was that had the defendant abided by its contract the plaintiff would soon have been selling its entire output. The testimony also shows that all the grease produced by the factory was sold by the plaintiff about as soon as it was turned out and that the grease was much more quickly salable than the glue. (Rec., p. 44.)

At the close of the plaintiff's testimony the court, without compelling the defendant either to proceed with its defense or to rest, allowed it to introduce a stipulation that the plaintiff had not complied with Section 1770b, of Wisconsin Statutes of 1898, and thereupon instructed the jury to find a verdict for the defendant.

The only defense, of the numerous ones set up in the defendant's answer, which the court upheld, was the defense based on said Section 1770b. (Rec., p. 110.) Said statute was as follows:

"Filing Articles; Process; Forfeiture; Contracts. Section 1770b. No corporation, joint stock company, express company or common law partnership incorporated or organized otherwise than under the laws of this state, except corporations or associations created solely for religious or charitable purposes, insurance companies and fraternal or beneficiary corporations, societies, orders and associations furnishing life or casualty insurance or indemnity, upon the mutual or assessment plan, shall transact any business or acquire, hold, or dispose of property in this state until such

association, company, partnership or corporation shall have caused to be filed in the office of the secretary of state a duly authenticated copy of its charter, articles of association or incorporation or of copartnership and all amendments thereto which may be made while it shall continue to do business therein. Such association, company, partnership or corporation causing a copy of its charter or articles to be so filed shall thereby be deemed to have made, constituted and appointed the secretary of state its true and lawful attorney upon whom all summonses, notices, pleadings or process in any action or proceeding against it may be served in respect to any liability arising out of any business, contract or transaction in this state and thereby to have stipulated that service thereof upon the secretary of state or his assistant shall be accepted irrevocably as a valid service upon it; and such appointment and stipulation shall continue in force irrevocably so long as any liability of such association, company, corporation or partnership remains outstanding in this state. Actions may be brought against any such association or partnership in the name by which it is commonly known. Whenever any such summons, notice, pleading or process shall be so served, the secretary of state shall forthwith mail a copy thereof postage prepaid and directed to such association, company, corporation or copartnership at its principal place of business, or if it be organized in a foreign country, then to its resident manager in the United States, and also an additional copy to such association, company, corporation or copartnership at its foreign address, or in any such case to such other person as may have been previously designated by it by written notice or request filed in his office. The failure to comply with any of the provisions of this section shall for the first such violation subject the association, company, corporation or copartnership or any agent, officer or person acting for it in this state, to a penalty of five hundred dollars, to be sued for and recovered in the name of the state, with the cost of prosecution by the district attorney of any county in which it or any of its agents or officers shall be located or reside or transact, or attempt to transact, any business; and such penalty, when recovered, shall be paid into the treasury of the county for the benefit of the school

fund. Every subsequent violation of any such provisions shall subject such association, company, corporation or copartnership, or of any of its agents or officers guilty thereof, to a penalty of not less than one thousand dollars, to be sued for, recovered and disposed of in like manner. Every contract made by or on behalf of any such association, company, corporation or copartnership affecting the personal liability thereof, or relating to property within this state, before it shall have complied with the provisions of this section, shall be wholly void on its behalf, and on behalf of its assigns, but shall be enforceable against it or them. In case any joint stock company, association or copartnership shall not have any articles of incorporation, organization, association or copartnership, it shall file in the office of the secretary of state, under the seal, if any, of the company or partnership, and under the signature of two of its principal officers, and in case of a partnership, under the signature of any member thereof, a written instrument appointing the secretary of state an attorney for the purpose of receiving service of summons, notice, pleading and process as aforesaid, and stipulating that the service thereof shall constitute personal service upon it; and be subject to like penalties for failure to comply with this provision as hereinbefore provided in case of a failure to file such articles. For filing such articles, every such association, company, corporation or partnership shall pay to the secretary of state twenty-five dollars, and for amendments thereto ten dollars." (Sandborn & Berrymans Rev. Stat. of Wis., 1898, page 1279.)

This is one of the sections of the Revised Statutes which were enacted at the adjourned session of the Legislature commencing August 17th, 1897. Section 4978 thereto provided that these statutes should take effect as follows:

"*These statutes shall take effect and go into operation on the first day of September in the year 1898, and on and after said day the Revised Statutes of the year 1878, Sanborn & Berrymans Annotated Statutes, * * * shall be repealed.*" (Id., p. 2917.)

It will be observed that the contract, for the breach of which action was brought, was made June 25th, 1898, and

its performance was at once begun before this statute went into operation.

In 1899 the Wisconsin Legislature, realizing that this Section 1770b was unconstitutional, amended it by leaving out the words *partnership* and *copartnership* and by abolishing the fine for repeated violations. (Session Laws of Wisconsin, 1899, Chap. 351, Sec. 27.) This amendment cannot in any wise affect the contract, because the contract was executed before its enactment.

To reverse the judgment entered on the directed verdict this writ of error was sued out.

Concerning this Wisconsin statute the plaintiff in error contends:

1. That it was void because a violation of the provisions of the Federal Constitution guaranteeing to the citizens of other States privileges and immunities of the citizens of Wisconsin, and the equal protection of the laws.

2. That such statute, if held applicable to the contract in question, was likewise unconstitutional and void as impairing the obligations of an existing contract.

3. That because the contract was made in June, 1898, and the statute did not become effective until September, 1898, the court erred in giving it a retro-active effect so as to make it limit the performance of a prior contract; and the language of the statute itself indicates no legislative intent to enable parties to a contract made before the statute was effective to escape the obligations of such contract.

4. That the statute, if held applicable to the contract in question, was likewise void as an attempted regulation of interstate commerce.

5. That the plaintiff in error had done nothing in performance of the contract to bring itself within the penal pro-

visions of that statute, and therefore the statute, whether constitutional or not, furnished no defense to the enforcement of the contract.

6. That if the defendant in error had, either under the provisions of the statute or the terms of the contract, a right to cancel the contract in question, it had clearly waived such right by its conduct.

7. That the defense of the statute in no possible view met the plaintiff in error's claim for commissions admittedly earned by the plaintiff in error by the selling of goods outside of the State of Wisconsin prior to its cancellation by the defendant in error.

All these questions were necessarily decided against plaintiff in error by the court in directing a verdict for the defendant. To this action of the court exception was duly taken. (Rec., p. 111.) The constitutional questions were presented to the court, not only in the argument of the demurrer to the answer but also in the argument preceding the giving of the peremptory instruction (Rec., pp. 109 and 110), and also in the particular exceptions taken. (Rec., pp. 111 and 112.)

SPECIFICATIONS OF ERROR RELIED ON BY PLAINTIFF IN ERROR.

1. The Circuit Court erred upon the trial of said action in granting the motion of the defendant and directing a verdict for the defendant.

2. Said Circuit Court erred in holding that the certain statute of the State of Wisconsin described in the answer of the defendant in error, being Section 1770b of the Wisconsin Statutes of 1898, was sufficient in law for a defense to said action of said plaintiff in error.

3. Said Circuit Court erred in refusing to hold that said

statute referred to and set out in the defendant's answer was void and inoperative, because contrary to the provisions of Section 2, Article 4, of the Constitution of the United States, providing that the citizens of each State shall be entitled to all the privileges and immunities of citizens in the several states.

4. Said Circuit Court erred in refusing to hold that said statute referred to and set out in the defendant's answer was void and inoperative, because contrary to the provisions of the 14th amendment of the Constitution of the United States, providing that no State shall make or enforce any laws which shall abridge the privileges or immunities of citizens of the United States nor deny to any person within its jurisdiction the equal protection of the law.

5. Said Circuit Court erred in refusing to hold that said statute of the State of Wisconsin referred to and set out in the answer of defendant in error was and is void and inoperative, under Section 10, of Article 1, of the Constitution of the United States, as a law impairing the obligation of the contract sued upon by the plaintiff in error.

6. Said Circuit Court erred in refusing to hold that the statute referred to and set out in the answer of the defendant was and is void and inoperative as to the plaintiff in error's said cause of action, because contrary to, and an infringement of Section 8, of Article 1, of the Constitution of the United States, inasmuch as the effect of said statute as applied by said Circuit Court to said plaintiff in error's cause of action, as shown by the evidence, was a regulation of or an attempt to regulate commerce between the several states, to wit: the interstate commerce between the said plaintiff in error and the defendant in error, and between the said plaintiff in error and the various persons with whom it transacted and would have transacted interstate commerce under said contract.

7. Said Circuit Court erred in refusing to hold the said statute referred to and set out in the answer of the defendant in error was void and inoperative as to the plaintiff in error's cause of action, as shown by the evidence, because the transactions between the said plaintiff in error and said defendant in error, and between said plaintiff in error and the various parties with which it had transacted, and would have

transacted business under the terms of said contract set out in the plaintiff's amended complaint, were interstate commerce.

8. Said Circuit Court erred in holding that said statute of Wisconsin, to wit: said Section 1770b of Wisconsin statutes of 1898, applied to or covered the said contract between said plaintiff in error and said defendant in error.

9. Said Circuit Court erred in holding that said Section 1770b of the Wisconsin statute of 1898, applied to or covered the actions and transactions of said plaintiff in error under and in pursuance of said contract, as said contract and said actions and transactions appeared from the evidence upon the trial of said cause.

10. Said Circuit Court erred in holding that said contract, as described in the complaint of the plaintiff in error and the actions of the plaintiff in error under and in the performance of said contract as the same appeared from the evidence, were in violation of, and were contravened by the prohibition of said Section 1770b of the Wisconsin statutes of 1898.

11. Said Circuit Court erred in refusing to hold upon defendant's motion for a peremptory instruction that the defendant by its acts and conduct in the premises as shown by the evidence had waived the right, if any it had, to set up said statute of Wisconsin as a defense to or excuse for the breach of said contract.

12. Said Circuit Court erred in applying the provisions of the statute of Wisconsin as set out and referred to in defendant's answer, said statute being no longer in force as in said answer set out at the time of the breach by the defendant of the contract sued on.

13. Said Circuit Court erred in permitting the counsel for the defendant in error to move for a direction of a verdict in favor of the defendant in error without first resting his cause.

BRIEF.

I.

The provisions of the Wisconsin Statute concerning Partnerships, joint stock companies and unincorporated associations are void, being in conflict with Section 2, Article 4, of the United States Constitution and with the Fourteenth Amendment; therefore, as the act had but a single purpose—to impose special conditions on all foreign business concerns alike—the whole act must fall.

Bank of Augusta v. *Earl,* 13 Peters, 517, 586.

Paul v. *Virginia,* 8 Wallace, 168, 177.

Barnes v. *People,* 168 Ill., 425, 430.

Allen v. *Louisiana,* 103 U. S., 80, 83.

Slauson v. *Racine,* 13 Wis., 398, 404.

Poindexter v. *Greenhow,* 113 U. S., 270, 304.

Trade Mark Cases, 100 U. S., 82.

Pollock v. *Farmers Loan & Trust Co.,* 158 U. S., 601, 635.

Cooley on Constitutional Limitations, Page 178.

Rev. Stat. 1898, Wis., Sections 1770b (*supra.*)

Laws of Wisconsin, 1899, Ch. 351, Section 27.

II.

The Wisconsin Statute, if it affords a defence to the action on this contract, is in so far unconstitutional as impairing the obligations of the contract.

Walker v. *Whitehead,* 16 Wallace, 314, 317, 318.

Peninsular L. & C. W. v. *Union O. & P. Co.,* 100 Wis., 488, 496.

Winter v. *Jones,* 10 Ga., 190, 195.

Robinson v. *McGee,* 9 Cal., 81, 84.

Austin v. *Burgess,* 36 Wis., 186, 195.

Green v. *Biddle,* 8 Wheat., 1, 84.

Hope Mut. Insurance Co. v. *Flynn,* 38 Mo., 483.

Fletcher v. *Peck,* 6 Cranch, 87, 137.

Statutes are never retroactive unless clearly so intended. A statute enacted at one time, to go into force at another, is to be deemed for all purposes as enacted at the later time, and need not be regarded by any one until that time.

Sedgwick on Statute Law, Page 83.

Endlich on Interpretation of Statutes, Sec. 499.

Bishop on Written Law, Sec. 31.

Wade on Retroactive Laws, Sec. 33.

Dewart v. *Purdy,* 29 Pa. St., 113, 117.

Encyclopedia of Law, 1st Ed., Vol. 23, Page 218.

Commonwealth v. *Fowler,* 10 Mass., 290, 300.

Jackman v. *Garland,* 64 Me., 133, 136.

Sammis v. *Bennett,* 32 Fla., 458, 460.
Larrabee v. *Talbott,* 5 Gill. (Md.), 426.
Ex parte Eames, 2 Story, 322, 325.
Charless v. *Lamberson,* 1 Iowa, 435, 445.
Rice v. *Rudiman,* 19 Mich., 125, 135.
State v. *Messmore,* 14 Wis., 163, 175.
State v. *Bond,* 49 N. Car., 9.

Therefore, a contract made between the enactment and going into effect of a statute cannot be affected by the statute. Such an effect would impair the obligations of the contract.

Mix v. *Vail,* 86 Ill., 40, 44, 45.
Security Sav. Ass'n v. *Elbert,* 153 Ind., 198, 203.
National B. & L. Ass'n v. *Black,* 153 Ind., 701.

III.

The contract between the parties related to and covered inter-state commerce, and, therefore, was protected against the application of the Wisconsin statute.

Cooper Mfg. Co. v. *Ferguson,* 113 U. S., 727, 736, concurring opinion.
McCall v. *California,* 136 U. S., 104, 108.
Robbins v. *Shelby, Tax District,* 120 U. S., 489, 494.
Corson v. *Maryland,* 120 U. S., 502.
Milan M. & M. Co. v. *Gorten,* 93 Tenn., 590.
Printed Record, pp. 41, 42, 44, 45.

IV.

No legislative intent is shown in this statute, properly construed, to release of the United States Glue Company from performance of its contract.

Aetna Life Ins. Co. v. *Harvey,* 11 Wis., 394.
Harris v. *Runnels,* 12 Howard, 79, 84, 85.

V.

The contract as construed by the parties did not require the plaintiff in error to do business in Wisconsin; where parties to a contract have by their acts put a practical working construction on it, the court will follow such construction.

Chicago v. *Sheldon,* 9 Wallace, 50, 54.
Lumber Co. v. *Stump,* 30 C. C. A., 260, 264.
Winchester v. *Glazier,* 152 Mass., 316, 323.
Topliff v. *Topliff,* 122 U. S., 121, 131.
Printed Record, pp. 57, 59, 62, 69, 76.

VI.

The plaintiff's acts under the contract were not "doing business" in Wisconsin, as forbidden by the statute.

United States v. *American Bell Telephone Co.,* 29 Fed., 17, 38.
American Loan & Trust Co. v. *E. & W. Ry. Co.,* 37 Fed., 242, 245.
Kilgore v. *Smith,* 122 Pa. St., 48, 57.
Thompson on Corporations, Vol. 6, Par. 7936.

Scruggs v. *Scottish Mortgage Co.*, 54 Ark., 566.

Morgan & Co. v. *White*, 101 Ind., 413, 414.

Beard v. *U. & A. Publishing Co.*, 71 Ala., 60, 62.

Sullivan v. *Lumber Co.*, 103 Ala., 371.

Cooper Mfg. Co. v. *Ferguson*, 113 U. S., 727.

Utley v. *Clark-Gardner Mining Co.*, 4 Col., 369.

St. Louis W. M. Co. v. *Consolidated B. W. Co.*, 32 Fed., 802.

Printed Record, pp. 45, 57, 62.

VII.

The alleged violation of the statute by the Diamond Glue Company had no connection with the breach of the contract by the United States Glue Company for which suit was brought. If, under the statute, the United States Glue Company had the right to repudiate the contract, it waived that right by its conduct.

Weeks v. *Robie*, 42 N. H., 316.

Lawrence v. *Dale*, 3 John., Ch. 23, 42.

Herman on Estoppel, Vol. 2, §§ 1039, 1040, 1043, 1046.

Genoa v. *Van Alstine*, 108 Ill., 555.

Printed Record, p. 85.

VIII.

The Diamond Glue Company in its dealings with other corporations did not break its contract with the United States Glue Company.

Printed Record, pp. 50, 52, 53, 74, 75.

IX.

Even if the plaintiff were not entitled to recover damages for the defendant's refusing to abide further by the contract, nevertheless, the instruction given to the jury was wrong, for the plaintiff showed a cause of action for the value of services rendered by it to the defendant.

Printed Record, pp. 15, 26, 52, 103-106.

ARGUMENT.

I.

The Wisconsin statute is unconstitutional and void—it conflicts with Section 2, Article 4, of the United States Constitution and with the Fourteenth Amendment.

The learned judge's direction is based solely upon the Wisconsin Statute pleaded in the United States Glue Company's answer. (*Supra*, p. 18.) The statute, as there pleaded, is the original statute which was enacted in August, 1897, but which was not to "take effect" or "go into operation" until September 1, 1898.

It will be observed that this statute provides for five things:

1. That every corporation, joint stock company, association or partnership not formed under the laws of the State of Wisconsin shall, before doing business in Wisconsin, file certain papers in the office of the secretary of state, appointing the secretary of state its attorney for the service of process.

2. That any corporation, partnership, etc., which has not complied with such directions shall not transact any business, or acquire, *hold or dispose* of any property in the state *until* it has complied with such provisions.

3. The secretary shall mail a copy of any service of process served on him to the corporation, etc.

4. That the failure to comply with any of the provisions of the act as aforesaid (apparently including the failure of the secretary of state to comply therewith)

shall "subject the association, company, corporation or co-partnership, *or any agent, officer or person acting for it in this state*" to a penalty.

5. That every contract made by or on behalf of any such corporation, partnership, etc., before it shall have complied with the provisions of this section shall be wholly void on its behalf, but enforceable against it or them.

This section of the statute pleaded by the defendant applied indiscriminately to corporations, common law partnerships, common law joint stock companies and associations of all kinds (except charitable, religious and insurance companies), whether organized under the provisions of any statute of another state or country or the federal government or not. That is, whether they had what is ordinarily called a charter or whether they existed simply as a voluntary association under common law principles of two or more individuals.

It is well settled that a state may impose what conditions it sees fit upon corporations formed by other states which seek to do business within its limits. This is because a corporation is not a citizen or merely an organization of citizens, but an artificial person existing only at the will of the sovereign and by virtue of its charter.

Bank of Augusta v. *Earle,* 13 Peters, 579, 587.

Paul v. *Virginia,* 8 Wallace, 168, 177.

It is equally well settled that a State cannot deprive citizens of other States of the right to do business within its borders, either individually or as a partnership, or subject them to any other or different requirements as to the manner of their doing ordinary business than are imposed upon its own citizens.

United States Constitution, Article 4, Section 2.

Barnes v. *People*, 168 Ill., 425, 430.

In the last case Barnes was fined under a statute of Illinois which prohibited any one from acting as agent for foreign insurance concerns without first obtaining a license. It appeared that Barnes was acting as an agent for several unincorporated "Lloyds" associations, composed of citizens of New York. It was held that if the law applied to the transactions of such citizens in Illinois, it was unconstitutional. The court says (page 430):

"The provision in question is against the citizens of other States merely and solely because they are not citizens of this State. It draws a line between them and our own citizens based on residence, and abridges a privilege freely allowed to our own citizens. * * * A discrimination directed only against underwriters residing without the State is invalid."

It has not been asserted that there is or ever was a statute of Wisconsin requiring a partnership or any voluntary association of Wisconsin citizens to file with the secretary of state an authorization that process may be served on him for them, or to pay a fee of $25.00, or any other sum, for so doing. Such being the case, it is obvious that the act above quoted from is unconstitutional so far as it applies to copartnerships or other voluntary associations of citizens of other States than Wisconsin. The unconstitutionality of so much of the statute must extend to the whole act.

The evident purpose of the act was to impose on all concerns consisting of more than one person, whether existing for business or for pleasure—as long as the aims were not religious, charitable or for insurance—a condition of filing certain papers with the secretary of state, paying him $25.00 and agreeing that he should be their agent for the

service of process before they were allowed to hold any property in Wisconsin or to do any business there. There is no mere inadvertent linking of partnerships with corporations. The desire of the legislature was to treat all alike, partnerships, associations and corporations, and its enactment in putting this desire into effect violates the United States Constitution. This court is not at liberty to attribute to the legislature any purpose which is not apparent in its enactments; therefore, the purpose there apparent being illegal, the enactment must fall.

The case of *Allen* v. *Louisiana*, 103 U. S., 80, is in point. There the court say (page 83):

"It is an elementary principle that the same statute may be in part constitutional and in part unconstitutional, and if the parts are wholly independent of each other, that which is constitutional may stand, while that which is unconstitutional will be rejected. 'But,' as was said by Chief Justice Shaw in *Warren* v. *Mayor and Aldermen of Charleston*, 2 Gray (Mass.), 84, 'if they are so mutually connected with and dependent on each other, as conditions, considerations or compensations for each other as to warrant a belief that the *legislature intended them as a whole*, and that, if all could not be carried into effect, the legislature would not pass the residue independently, and some parts are unconstitutional, all the provisions which are thus dependent, conditional or connected, must fall with them."

The point to be determined in all such cases is whether the unconstitutional provisions are so connected with the general scope of the law as to make it impossible, if they are stricken out, to give effect to what appears to have been the intent of the legislature.

Justice Cooley in his "Constitutional Limitations" (page 178) says:

"If its" (the statute's) "purpose is to accomplish a single object only, and some of its provisions are void, the whole **must fall, unless sufficient remains to effect the object** without the aid of the invalid portions."

The law of Wisconsin is to the same effect. *Slauson* v. *Racine,* 13 Wis., 398, 404, involved a statute annexing certain land to the City of Racine. Provisions as to the taxes on these lands were unconstitutional and the court, on the ground that these provisions were intended as compensations for the annexation and that striking them out would leave a law not expressing the legislative purpose, held the whole act must fall, citing *Warren* v. *Mayor and Aldermen of Charleston, supra.*

There is in this Section 1770b no separation of any sort between the provisions applicable to corporations and those applicable to partnerships, associations or joint stock companies. At the commencement of the act, indeed, corporations was the first word used; a little further down we find "association, company, partnership or corporation." Again "association, company, corporation or partnership." There is throughout the act no separation of the incorporated from the unincorporated bodies, except, indeed, in one or two specific provisions as to the *latter.* For instance: That action may be brought against "any such association or partnership in the name by which it is commonly known," and "In case a joint stock company, association or copartnership shall not have any articles of incorporations, organization, association or copartnership, it shall file in the office of the secretary of state under the seal, if any, of the company or partnership, and under the signature of two of its principal officers, and in case of a partnership under the signature of any member thereof, a written instrument," etc.

If anything is obvious in reading over this statute, it is that it was the legislative intent to put into one class all foreign corporations, unincorporated associations and joint stock companies, and even ordinary partnerships, subject to a law

operating uniformly as to all, and that there was great care in drafting the act to make its provisions include unincorporated as well as incorporated bodies. In other words, the addition of unincorporated associations and partnerships was not incidental to the main idea of imposing conditions on corporations, but the principal idea was, while imposing conditions, to treat all concerns originating outside of the State and consisting of more than one person alike. Consequently, there is no excuse for asserting that, although the act is unconstitutional in regard to partnerships and voluntary associations, it can be still applied to corporations. To do so would violate the legislative intent. It would draw distinctions in the treatment of various classes of joint undertakings which the legislature painstakingly shows its purpose to treat alike.

The case of *Poindexter* v. *Greenhow*, 114 U. S., 270, 304, is particularly in point. The court there says:

"It is undoubtedly true that there may be cases where one part of a statute may be enforced as constitutional, and another be declared inoperative and void, because unconstitutional; but these are cases where the parts are so distinctly separable that each can stand alone, and where the court is able to see, and to declare, that the intention of the legislature was that the part pronounced valid should be enforceable, even though the other part should fall. *To hold otherwise would be to substitute for the law intended by the legislature one they may never have been willing by itself to enact.* An illustration of this principle is found in the *Trade Mark Cases*, 100 U. S., 82, where an Act of Congress, which, it was claimed, would have been valid as a regulation of commerce with foreign nations and among the states, was held to be void altogether, because it embraced all commerce, including that between the citizens of the same state, which was not within the jurisdiction of Congress, and its language could not be restrained to that which was subject to the control of Congress. 'If we should,' said the court in

that case (page 99), 'in the case before us undertake to make, by judicial construction, a law which Congress did not make, it is quite probable we should do what, if the matter were now before that body, it would be unwilling to do.' "

Poindexter v. *Greenhow* was cited with approval and followed in the late case of *Pollock* v. *Farmers Loan & Trust Company*, 158 U. S., 601, 635. There, the court held the income tax invalid so far as it applied to income in the nature of rents from real and personal property, and for that reason held the entire tax invalid even as applied to other sources of income. That case is certainly no stronger than the present. There, the reason for holding that the act could not be divided and that part enforced which would have been constitutional if enacted alone, was that the scheme of taxation must be considered as a whole. But there is no indication in the income tax act, except in the lumping together of all kinds of income, that it was the controlling desire of Congress to treat all sources of income alike; whereas, in the act now before the court, as has been pointed out, it was the evident intention to treat partnerships, voluntary associations and corporations all in precisely the same way, as is manifested not only by their being lumped together, but also by the care with which the provisions, applied in similar acts of other legislatures to corporations alone, are carefully fitted and made applicable to voluntary associations, unincorporated companies and partnerships.

But it may be suggested that in 1899 the Wisconsin legislature, seeing the fault in this previous legislation, by amendment remedied that fault. The statute of 1899, which was passed May 4th, and went into force on May 9th of that year (Chapter 351, Section 27 of Laws, Wis., 1899), amends Section 1770b by striking out the words "partnership" and "copartnerships" wherever they occur, by striking out the

provisions regarding subsequent violations after the first, and by adding a provision that any corporation which complied with Section 1750a of the annotated statute should not be required to make any further deposit under Section 1770b of the laws of 1898. This amendatory act is significant, as pointing out the fact that the Wisconsin legislature itself realized the unconstitutionality of its previous enactment and sought by this amendment to make it constitutional.

This amendment, made in 1899, was no evidence whatever of the legislative intent in 1897 or 1898. It only shows what the legislature intended in 1899. The legislature then was doubtless composed in part of different persons from the previous legislature, so that it cannot be known whether the previous legislature would have passed the act in the form that the amendment of 1899 left it. At all events, it did not pass any such act.

This amendment, it must be supposed, was not idly enacted, and the fact that it was passed may be taken to show that its passage was necessary in order to carry out the ideas of the legislature of 1899. Now, if so much of the act of 1897 as did not concern partnerships was valid, even though the inclusion of *partnerships* was unconstitutional, it was totally unnecessary for the legislature of 1899 to strike out the word partnerships. The fact, however, that the legislature did amend the previous act by striking out the word which left in would have no effect, does tend to show that the whole act was void on account of the inclusion of partnerships in its provisions.

But whatever effect this amendment might be contended to have in remedying the unconstitutionality of the law of 1898, it cannot benefit defendants in error for the following reasons:

1. It is not pleaded in the United States Glue Company's answer, but the original statute unamended is pleaded.

2. The contract on which suit is brought was not only made before this amendment *went into force,* but was made and in good part performed before this amendment was even *enacted.*

3. The amendment did not do away with the objections as to the unconstitutionality of the act. The amendment strikes out the words *partnership* and *copartnership* from the act, but it does not strike out or affect the provisions as to common law stock companies or other voluntary associations.

The act, as it stands when amended, would prevent the citizens of other states from organizing a land association for the purpose of investment in Wisconsin lands; it would prevent an ordinary unincorporated club formed, say in Chicago, from sending an agent into Wisconsin for the purpose of arranging for an excursion or a dinner in Milwaukee; it would prevent a trades union, organized in another state, from having a branch in Wisconsin, unless, in each case, compliance were had with the provisions of Section 1770b.

It is clear that the citizens of any state have a right to do any of the ordinary acts of life in Wisconsin, free from any restraints not common to the citizens of Wisconsin, no matter whether the citizens of other states are acting individually or as a partnership or any other form of unchartered association which may seem most advisable to them.

A citizen of Illinois may do any of the ordinary acts of business or pleasure in Wisconsin which are not denied to the citizens of Wisconsin. A partnership of Illinois citizens has the same privilege, and an association of Illinois citizens, whether it be a trades union, club, land association

or any other association, by virtue of the United States Constitution, cannot be met at the Wisconsin border with the demand that it file papers and pay $25 to the secretary of state before it can be allowed to do any of the ordinary affairs of life in Wisconsin. This statute, even as amended, in 1899, would deprive such associations of this right. The amendment by specifically striking out the words "partnership" and "copartnership" would as pointedly leave in the words "association," "company" and "joint stock company" and therefore reaffirm the purpose of the Wisconsin legislature not to make the question whether a concern should be excluded from Wisconsin under certain conditions depend on the question of its incorporation under foreign law or not, but upon the question whether or not it was originated in Wisconsin. That purpose, as we have pointed out, is illegal, therefore, the Wisconsin statute, even after the amendment of 1899, still remains unconstitutional and must be disregarded.

II.

If the Wisconsin statute—Section 1770b of the Laws of 1898—affords a defense to the suit on this contract, then the statute is in so far unconstitutional, because it impairs the obligations of a contract.

The 10th Section, Article 1, of the United States Constitution, provides that no State shall pass a law impairing the obligations of contracts. This provision amounts to this: That any law of a State which impairs the obligations of a contract, valid when made, is, in so far as applied to that contract, unconstitutional and void. So that, if we have a case of a contract, valid when made, containing no provisions contrary to the law of the State where made, any law which

would, if enforced, impair the obligations of this contract as between the parties thereto, just so far as it would tend to do so, comes in conflict with the United States Constitution and cannot be sustained. The law may be perfectly valid for all other purposes; it may be valid in other respects, even as applied to the parties to the contract, but it cannot be allowed so to act as to release either of the parties to such contract from his obligations to the other.

Walker v. *Whitehead*, 16 Wallace, 314, was a case of a suit on a note given in 1864. In October, 1870, the Georgia legislature passed an act providing that in all suits on contracts the plaintiff should not recover unless he should show that all legal taxes payable on the contract had been duly paid for each year. This court held this statute unconstitutional, as it impaired the obligations of the contract They said (p. 317):

"These propositions may be considered consequent axioms in our jurisprudence.

"The laws which exist at the *time* and place of the making of a contract, and where it is to be performed, enter into and form a part of it. This applies alike to those which affect its validity, construction, discharge and enforcement."

And later (p. 318), the court says:

"The obligation of a contract is the law which binds the parties to perform their agreement.

"Any impairment of the obligations of the contract—the degree of the impairment is immaterial—is within the prohibition of the constitution. * * *

"Against all assaults * * * the contract is shielded by the constitution. It must be left with the same force and effect, including the substantial means of enforcement, *which existed when it was made*. The guarantee of the constitution gives it protection to that extent."

In *Peninsular L. & C. W.* v. *Union, etc., Co.*, 100 Wis., 488, 496, the court said:

"A contract includes by implication the law for its enforcement as the same existed at its inception, and any change materially impairing the right or interests of the parties so it may be said the contract obligation is impaired, is within the constitutional inhibition and void."

In determining whether the statute impairs the obligations of this contract, we must consider the effect intended to be given it by the legislature in two regards:

First. Was it to be regarded for any purpose as part of the law of Wisconsin, which necessarily entered into the contract between the parties before September 1st, 1898?

Secondly. If it were not before in force, did it so operate on September 1st, 1898, and thereafter, as to affect the obligations of the contract in question?

Taking the second question first, it is evident that if the statute was not for any purpose to be regarded as part of the laws of Wisconsin until September 1st, 1898, it was, as applied to the performance of the contract made before that date unconstitutional. For one provision of the statute required the foreign corporation to pay to the secretary of state a fee of $25.00. Now, such a fee was, of course, trifling in comparison with the interests involved in this contract, but if the legislature, after the contract was made, could impose as a condition upon one of the parties that it should pay $25.00 before being allowed to carry out the contract or to force the other party to carry it out, there would be nothing to prevent the legislature from compelling the payment of $250,000.00 instead of $25.00, and from thus as effectually doing away with the obligations of the contract as though it had passed a law annulling it.

The case of *Winter* v. *Jones*, 10 Ga., 190, 195, aptly states the correct rule as to when infringement of the constitution will avail to render a law void. Justice LUMPKIN, delivering the opinion of the court, says:

"All commentators, and all the adjudicated cases upon constitutional law, agree in these fundamental propositions: That the objection to a law, on the ground of its impairing the obligations of a contract, does not depend upon the *extent* of the change which the law may make in it. That any deviation from its terms, by *imposing conditions not expressed in the contract*, however minute and apparently immaterial in their effect, is within this constitutional prohibition."

So in *Robinson* v. *Magee*, 9 Cal., 81, 84, it was held that a statute in force after the purchase of certain county warrants requiring the holders to present the warrants for registry on or before a certain day, and making them void, if not so registered, is unconstitutional. The court says (p. 84):

"As the law enters into the contract, and is therefore a part of it, the obligations of such contract must depend upon the law *existing at the time the contract was made*. The contract being complete and operative, the legislature cannot, by a subsequent act, impair its obligations by requiring the performance of other conditions not required by the law of the contract itself."

Is not a requirement that a corporation should pay a fee of $25.00 and file its charter with the secretary of state before being able to carry out an otherwise valid contract made before the statute went into force, just as much an impairment of the obligations of the contract as a requirement that the contract itself should be registered?

And this court has said in *Green* v. *Biddle*, 8 Wheaton, at page 84:

"The objection to an act, on the ground of its impairing the obligations of the contract, can never depend upon the *extent* of the changes which the law effects in it. Any deviation from its terms, by postponing or accelerating the time of performance which it prescribes, *imposing conditions not expressed in the contract*, or dispensing with the performance of those which are, however minute and im-

material upon the contract or parties, impairs its obligations."

So in *Hope Mutual Insurance Company* v. *Flynn*, 38 Mo., 483; 90 Am. Dec., 438, it is said (p. 484):

"It is not within the constitutional competency of the legislature to annul by statute any legal ground on which a previous contract is founded, *or to create a new bar by which such action may be defeated.*"

The case in this view amounts simply to this: A corporation of Illinois comes into Wisconsin at a time when it has a perfect right to do so, makes a contract in no way involving the health or morals of the people of that State, perfectly valid when it was made—an ordinary business arrangement. Can subsequent legislation deprive it of the benefit of this contract? Supposing the law in question had simply provided that no contract made by a foreign corporation could be carried out in Wisconsin on any terms, and further provided that it was to go into force September 1st, 1898. Could it be contended that a contract made before September 1st, 1898, could not be carried out thereafter? And yet, such a law would embrace no more than the law in question as applied to the plaintiff's contract by the action of the trial court.

If, as seems to be well settled, a statute increasing a debtor's exemptions is void as to debts existing before it takes effect, how much more must a statute like this one be void if it would operate so as to abolish all remedy on a contract.

A contract executory as well as executed is protected by the prohibition against impairing contract obligations.

Fletcher v. *Peck*, 6 Cranch, 87, 137.

Taking up now the other question as to whether Section 1770b was part of the Laws of Wisconsin for any purpose before September 1st, 1898, this question has two bearings on the present case: First, the one above mentioned, that if the act was for no purpose in force before September 1st, 1898, its going into force at that date constituted an impairment of the obligations of the contract in this case and so was unconstitutional. Secondly, leaving out any constitutional question, the question still remains whether the act was intended in any way to affect the carrying out of a contract made before September 1st, 1898. These two questions—the constitutional one and the one simply of the construction of the statute, are so involved that to consider them entirely separately would waste the time of the court. We shall therefore treat the two questions in part together and cite some authorities bearing on the interpretation of the statute, both in regard to the application of the provisions of the constitution against impairing obligations of contracts, and in regard to the question of the application of the statute itself to acts done before it went into force, but after it was enacted.

The important question in both regards is as to what law entered into the contract as a part of it when it was made, that is, whether the statute was for any purpose in force before by its terms it went into effect. For if the law is regarded as speaking from September 1st, 1898, it cannot affect contracts made theretofore—whether executed or executory.

It would seem clear on principle that a statute can have no effect whatever before it is in force, that before that time no one need take notice of it, that it cannot become part of or affect contracts made theretofore. Were it otherwise there would be a time when no contract could be safely made con-

cerning the subject-matter of a statute, for the theory upon which a statute affects the performance of the contract is that the statues in force at the time the contract is made enter into and become a part of the contract itself. Now, a statute enacted but not yet in force can hardly so enter into a contract as a part of it, for such a statute may be repealed before the time arrives when it shall go into force and in consequence it may never be a part of the law of the state. Consequently, if such an enactment which never becomes a law, or which may never become a law, is allowed to be regarded as part of the contract between the parties, then the parties make a contract as to important terms of which they can have no knowledge for some time after their contract is made. That is, as they do not know whether the statute ever will be, in fact, a law, the contract between the parties may mean one thing, and may mean another, dependent upon the question whether or not the statute is allowed to go into effect.

We do not here contend that it is beyond the power of the State, by appropriate legislation, to enact that there shall be a time within which contracts can only be made subject to a contingency as to whether certain laws shall in future be in force or not in force, but it is evident that such was not the purpose of the Wisconsin legislature, nor is it conceivable that such should be the purpose of any legislature. It will be observed that in this case, the statute which the defendant is attempting so to apply as to annul the contract which it made with the plaintiff was enacted more than a year before it was to go into force, so that according to defendant's theory, during all this time the capacity of foreign corporations concerning business to be done in Wisconsin would remain in suspense. The corporations could not know whether

this Section 1770b would ever be a law or not—whether it would be read in as a part of their contracts or not.

Let us carry the argument a little farther, supposing the contention of the defendant to be correct. It is within the power of the State to enact, say in 1900, all sorts of laws which are not to go into effect by their terms until 1905, and then, when contracts are made, relying on these laws—as, to follow defendant's argument, contracts made in the interval would have to be made—the State may repeal the laws before they go into effect and thus effectually impair the obligations of these contracts. This is somewhat far-fetched perhaps, but it is a possibility, and the only way of meeting it is by the view that a law is no law until it is in force.

It is a general principle that all persons must take notice of the laws of the place where contracts are made, but the defendant, to make out its defense, has to extend that principle to include a rule that all persons must take notice not only of all laws at the time and place where the contract is made, but also of laws which the legislature has said, in a way that does not bind the legislature itself, shall be in force at some future time. As well might a party be held to be bound by a notice of every bill introduced by a member of the legislature and the contention raised that a party's rights are affected by an act subsequent because the bill was introduced before his contract was made.

Our argument is not affected in the least by the fact that the legislature may at any time repeal any law that it has enacted, for such a repeal does not operate to restrain the effect of the law so far as it entered into a contract made while it was in force. (*Fletcher* v. *Peck*, 6 Cranch, 87, 135.) Whereas, a repeal of an act which has never been in force must have precisely the same effect as though such an enact-

ment had never been made at all. It must wipe it out root and branch. It would indeed be peculiar to hear a litigant claim that a contract was void because a law had been enacted affecting it but had been repealed before it ever was in force. The argument on behalf of the defendant makes every law, against the will of the legislature, in force so far as it affects contracts from the moment of its enactment.

We, of course, are not now concerned with the effect of this statute upon the Diamond Glue Company as between it and the State of Wisconsin in case it attempted to do business in Wisconsin, even solely in carrying out this contract, without complying with the statute. This is not the question before the court. It might indeed be interesting to inquire whether a State, in direct proceedings against a foreign corporation could collect a penalty from a foreign corporation for carrying out a contract, valid when made but the performance of which was made a penal offense by a subsequent act of legislation. But this is not the question in this case. This court is not called upon to decide between the State of Wisconsin and the plaintiff. The question here is simply whether the defendant can escape the obligations of its contract as between itself and the plaintiff by claiming that these obligations are impaired, in fact, done away with, on account of legislation in force only after the making of the contract and after its partial performance.

There is another consideration which enters into the construction of this statute. It has been pointed out that the statute purports to invalidate contracts made against its provisions in so far only as it may be to the advantage of the foreign corporations to endeavor to enforce these contracts, while it expressly holds them valid in favor of those who may contract with the foreign corporation. But if the stat-

ute is to be allowed to have the effect contended for by the defendant, a curious state of things will result—the contract, if made after September 1, 1898, when the statute was in full force, would be enforceable against the plaintiff but not against the defendant, whereas, when made before September 1, 1898, its performance after that date became illegal and the contract was invalidated on behalf of both plaintiff and defendant; for the theory of Judge Seaman's opinion is that the defendant was justified in breaking the contract in December, 1900, because it was justified in refusing to *assist in the breach of the statute*. For certainly, on that reasoning, if the defendant was justified in refusing further to carry on the contract on the ground that it would be assisting in a breach of the law, it could not be held to demand that the plaintiff should go on breaking the law if the plaintiff should have chosen to declare the contract at an end. So that we would have this result: contracts made after the enactment of the statute but before it went into effect might be wholly avoided by the action of the statute, whereas contracts made after the statute went into effect would be only avoided as regarded one of the parties thereto. Thus the statute would operate with greater deterrent effect when it was not in force than after it went into force.

And it is no answer to this contention to say that it was an implied term of the contract that the Diamond Glue Company should, on September 1, 1898, comply with the statute. Such a term could be implied only on the theory that the statute was part of the law in force when the contract was made, while the legislature expressly provided that it was not.

Sedgwick, in his work on Statute Law, page 83, says in regard to the time when a statute is in force:

"This subject is of no small consequence as the law is assumed to be known by every citizen *from the time fixed for it to go into operation.*"

And in the Encyclopedia of Law, 1st Edition, Vol. 23, page 218, we find:

"Before that time no rights may be acquired under it, *and no one is bound to regulate his conduct according to its terms.* It is equivalent to a legislative declaration that the statute shall have no effect until the designated date."

Other text writers lay down the same rule:

"Until the day when an act is to take effect arrives, the law has no force, even as notice to the persons to be affected by it." Endlich, Interpretation of Statutes, Section 499.

"A statute which is to become a law at a future day is a nullity in the meantime. It does not even operate as notice to persons to be affected by it, nor does a repealing clause in it put an end to the law to be repealed. One cannot be punished under it for what he does before the day of its taking effect." Bishop on Written Laws, Section 31.

"Statutes do not always go into effect from the time of their enactment. When they are, by the constitution or their own provisions, made to take effect at a future date, they will be regarded as retrospective, in so far as they undertake to regulate duties or obligations which may arise prior to that date, though subsequent to the enactment of the law. The mere fact that parties contract, with actual or constructive notice of an impending change in the law, raises no presumption that the contract was made with reference to such change. *The law by which men are supposed to be governed in all their transactions is that in force at the time, and not that which they have reason to believe will go into operation at a future day;* until then it does not become a law in the fullest sense of the term, nor can they know that it will ever become binding. *The law-making power may repeal it before the time of its going into effect arrives,* with the repeal to take effect at once. *The very object of fixing a future date would be utterly defeated by a construction which gave effect to the statute prior to the time fixed.* So, where a statute decreed that after a designated future date no arrearages of rent should be *recovered* by action,

within six years after the same should have become due, it was held that it could not take effect by being pleaded to an action *commenced* before that date." Wade on Retroactive Laws, Section 33.

In *Dewart* v. *Purdy*, 29 Pa. St., 113, 117, the court said:

"Retro-active legislature is not necessarily unconstitutional, but unless it be remedial it is uncongenial to our institutions and hazardous to private rights. Nothing short of the most indubitable phraseology is to convince us of the fact that the enactment is to have any other than a prospective operation; and when they fix a future day for it to take effect, they stamp its prospective character on its face."

"Had it been repealed before that date, it would have had no future existence and no operation whatever. Though not repealed, it must not have a construction that would give it effect during the period of its suspended animation, for this were to violate the will of its creator."

So in the case of *Commonwealth* v. *Fowler*, 10 Mass., 290, an act creating a new county and providing for the appointment of officers therein by the governor was not to take effect until a future day there mentioned. The governor, before that day came, attempted to appoint an officer in the county, and it was held that such appointment was void. The court says (page 300):

"The act for erecting a number of towns in the south part of the County of Hampshire into a separate county by the name of Hampden passed the legislature on the 25th day of February, 1812. But, by the last section of the act, its operation was suspended until the 1st day of August then next; no provisions being made for the appointment of officers in the interim. We are all of the opinion that the proceeding of the executive in this case was irregular and that the appointment of the respondent to the office of judge of probate for the County of Hampden, at the time when it was made, was void."

The case of *Jackman* v. *Garland*, 64 Maine, 133, is also in point. There an act was passed and approved March 3rd, 1874, requiring a certain notice to the selectmen of a town

of any injury caused by a defective way within sixty days of the accident, except in the case of injuries "already sustained." This act, by a provision of the general law, did not go into effect until thirty days after the adjournment of the legislature. It was held that the act did not apply to the case of an injury received March 7th, 1874, between the enactment and the going into force of the statute. The court says (page 136):

"An act is of no force until it becomes a law. The words must be construed *as if spoken when the act takes effect.* In legal contemplation that is the time when they were spoken."

To the same effect is the case of *Sammis* v. *Bennett,* 32 Fla., 458. In 1893 the Florida legislature passed an act providing that appeals in chancery might be taken within six months after the entry of the order from which the appeal was taken. This act was approved May 11th, 1893, and went into force by provision of the Constitution August 1st, 1893. It was held that it had no force until August 1st and applied only to decrees and orders entered after that date. The court said (p. 460):

"The purpose of Section 18 of Article 3 of the Constitution, that a statute shall not take effect until sixty days from the final adjournment of legislature at which it may have been enacted, unless it is otherwise specially provided in the act, is, according to what we hold the better view, to enable the people to become acquainted with its provisions, but not to require them to govern their acts by the law before it becomes operative. It was contemplated that by the lapse of the sixty days the status of the session of the legislature would be published and would be accessible to the public, but they are not operative laws until the stated period has expired, and no one can be charged with notice of them reasonably until it does expire, or, what is the same, until they go into effect."

The purpose of the legislature in postponing the opera-

tion of Section 1770b until September 1st, 1898, was to allow the people to become acquainted with the law at that date and was not in order to compel them to govern themselves by it in the meantime. Following the decision of the Florida court, this section in so far as it affects the performance of a contract, would only affect those made on or after September 1st, 1898.

So in *Larrabee* v. *Talbott,* 5 Gill. (Md.), 426, the court said (p. 441):

"The said bankruptcy law of the United States was passed on the 19th day of August, 1841; but it was expressly provided by the 17th section of the statute that it should take effect only from and after the 1st day of February, 1842. This was equivalent to declaring that the act should have no effect until that day; and therefore there is no foundation for the point made by the counsel for appellant that the insolvent laws of Maryland were suspended during the period between the enactment and the going into force of the United States law."

This last case cites *Ex parte Eames,* 2 Story, 322, 325, where Justice Story says of this same bankrupt act:

"It *ipso facto* suspended all action on future cases arising under the State insolvent laws where the insolvent persons were within the purview of the bankrupt act. I say future cases, because very different considerations would or might apply, where proceedings under any State insolvent laws *were commenced and were in progress before the bankrupt act went into operation.*"

The case of *Charless* v. *Lamberson,* 1 Iowa, 435, is a good illustration of the principle that until a law is in force it is as though never enacted. This case was an action by an execution purchaser to recover a lot. The defendant bought the lot in 1848, and on July 7th, 1851, moved on it. By the statute of 1849 the defendant could have had a homestead from combined ownership and occupancy. A new code approved February 11th, 1851, to go into effect July

1st, 1851, repealed the act of 1849 and substituted other provisions. The execution purchaser recovered his judgment in May, 1851, but did not levy his execution until after July 6th of that year. It was held that his judgment, having been recovered when the act of 1849 was in force, even though the act of 1851 was already enacted which repealed the act of 1849, was governed solely by the act of 1849 as to the remedy by which it was to be enforced, even though this remedy was not enforced until after the act of 1851 went into effect. That, however, the defendant could only claim his exemption under the act of 1849, and not having perfected it while that act was in force the plaintiff must recover. The decision is all the more pointed from the fact that the act of 1851 excepted debts contracted "prior to the passage of this law," and it was held that even this expression must be read as speaking from the time the law went into effect and as meaning debts contracted prior to July 1st, 1851, and that, therefore, there was no attempt by the legislature to control judgments obtained between February 5th and July 1st, 1851.

The Iowa constitution provided that "no law of a public nature should *take effect* until same shall be published and circulated in the several counties of this State by authority," and the court regarded the postponement of the taking effect of the act until July 1st, 1851, as intended to give time for such publication, etc. (p. 443):

"Had it never been published and circulated it would have been no more the law of the land than if it had never been passed. Neither was it the law, so as to affect the rights and property of parties, until it was so published. The words 'prior to the passage,' I think amount to the same thing as if the legislature had used the word 'heretofore,' and either must relate to the time of taking effect and not to the time of passage."

So we may say that the arrival of September 1st, 1898, was just as essential to the existence of Section 1770b as a law, as was its passage by the legislature. Before September 1st, 1898, it had no more the force of law than if it had never been enacted. Until September 1st, 1898, it could not affect the property, rights or contracts of the Diamond Glue Company. It is admitted it did not absolutely invalidate the contract. How can it be in force so as to become part of a contract and yet not be in force sufficiently to invalidate one? Following the decision in the *Charless* case, the rights of the Diamond Glue Company acquired in between the enactment and the going into force of Section 1770b could be enforced, even after the law went into force, without reference to it.

In *Rice* v. *Ruddiman*, 19 Mich., 125, 135, it appeared that an act had been passed by the Michigan legislature, organizing the County of Muskegon; it was approved February 4th, 1859, and, not being ordered to take immediate effect, under the Michigan constitution went into effect May 16th, 1859. The act provided for the election of county officers "at the annual township meeting to be held in April next." The County of Muskegon was attempted to be organized under this act, and the contention was made that the act was void, inasmuch as it provided for an election to be held before the act itself could take effect. In regard to this point the opinion delivered by Judge CHRISTIANCY said:

"It took effect in May, 1859, and must be understood as beginning to speak at the moment when it became a law and not before. *It must have the same construction as if passed on the day when it took effect.*"

So with Section 1770b, it should be regarded as speaking only from the moment that it took effect and as if enacted

on September 1st, 1898. Contract rights acquired before that date cannot be affected by it. Up to that time no one was required to take notice of its provisions or pay any attention to it.

The Supreme Court of Wisconsin has had occasion to pass upon this very question in the case of *State* v. *Messmore,* 14 Wis., 163. At that time the Wisconsin constitution required that each of the circuit judges should be a resident of the circuit for which he was elected, and that such residence must continue as long as he continued to be judge. The legislature passed an act creating a new circuit and thereby restricting the boundaries of one of the old circuits so as to leave the residence of the judge of that circuit outside of the new boundaries. It appears that the act was approved March 30th, 1861; was published April 4th, and by its terms went into effect April 10th. The material question in the case was as to when the judge was obliged to move to the new circuit. The court held that he had a reasonable time *after April 10th,* the date when the act went into effect, and that he was not obliged to take notice of the act from the time of its passage, or even of its publication. They say (page 175):

"We do not, however, hold that the judge was bound to take notice of the change or prepare to remove until the act was to go into actual operation. In these times of fluctuating and uncertain legislation, it would be enough that he prepared for the contingency when it actually happened, and then he must have a suitable and convenient length of time for that purpose. *For aught that he knew or might suppose, the law might have been repealed, or further suspended, before the day fixed for its taking effect.*"

This quotation must be taken as expressing the law of Wisconsin, and the court has only to apply it to the statute in question in order correctly to construe that statute. For it will not be disputed that the rules laid down by the Su-

preme Court of a State in construing the legislation of that State are binding on all other courts. Here, then, we have the Supreme Court of Wisconsin saying that it is not necessary for persons to take notice of the terms of a Wisconsin law or to prepare for compliance therewith until that law goes into operation, using the very reasoning which we have pressed in our argument: that it could not be known before the act actually went into effect whether it would ever become a law, inasmuch as it might be repealed before that time. Now, if we follow the Supreme Court of Wisconsin in construing this statute, this contract must certainly be free from its operation. At the time of making the contract the parties were not bound to pay any attention or in any way to prepare for the operation of any law which was not then in effect—and which might never be. The law did not become part of the contract, nor was an agreement to comply with the law to be implied as among its terms, and when the law finally did go into effect on September 1st, 1898, it was as though it had not been enacted before that date. That was the first day in which any one was obliged to take notice of the provisions of the law. Therefore, if the law on that date affected the obligations, no matter how slightly, of the contract made before that time, it is so far unconstitutional. In other words, the obligations of the contract theretofore made were free from the restraints or the conditions of that law. The parties to this contract were just as much obliged to carry it out as though that law had never been enacted—as though it never had gone into force. The United States Glue Company was as absolutely bound to carry out the provisions of the contract and bound to give the Diamond Glue Company the benefit of it.

In the face of all these authorities, counsel for the defendant in error contended, and the court held, that the Dia-

mond Glue Company, in making the contract of June 25th, 1898, was obliged to take notice of the terms of the statute which did not become a law until September 1st, 1892. We quote from a written argument made by counsel for the defendant in the Circuit Court:

"Counsel seems to consider that we have contended that it was illegal for the parties to make the contract in June, 1898.

"We have merely contended that the contract was entered into with full notice that it would be illegal for the plaintiff to perform it, unless it complied with the Wisconsin statute,"—in other words, that the Wisconsin statute, which, by its own terms, was not to "go into operation" until September 1st, nevertheless operated to the extent of entering into, affecting and becoming part of a contract made June 25th. Contrast this with the statements made by the text writers, and the decisions above cited, and especially with the language of the Wisconsin Supreme Court, in *State* v. *Messmore*, *supra:*

"We do not, however, hold that the judge was bound to take notice of the change of the power to remove until the act was to go into operation * * * for all that he knew, or might suppose, the law might be repealed or further suspended, before the day fixed for its taking effect."

State v. *Bond*, 49 N. Car., 9, was a criminal case where the defendant had been accused of selling liquor to slaves. The offense was charged to have been committed October 10, 1855. In 1854 the legislature had enacted a revised code to go into effect January 1, 1856. This code enacted new rules as to the quality of proof necessary in convictions of this sort. It was held that, although the trial was had after January 1, 1856, still, this provision of the revised code would make the law an *ex post facto* one, contrary to the United States Constitution, and the judgment of conviction was therefore reversed.

Inasmuch as the same section of the constitution (Art. 1, Sec. 10) forbids states to pass *ex post facto* laws and laws impairing the obligations of contracts, it would see that similar reasoning to that in the case of *State* v. *Bond* would lead directly to the result that no law should be allowed to release any party to a contract from its obligations, if the law went into effect after the execution and part performance of the contract, even though enacted before such execution.

But we are not left alone to argument by analogy and on principle as to the effect of a statute upon a contract made after the statute was enacted, but before it was to go into force. The case of *Mix* v. *Vail*, 86 Ill., 40, was a suit on an injunction bond. It appears that by virtue of a statute of 1861 no suit could be maintained for damages upon an injunction bond unless the damages were assessed in the suit in which the bond was given. A statute was passed by the Illinois legislature and approved March 25, 1874, which provided that the failure to assess damages in a suit should not operate as a bar to an action upon the injunction bond. This act went into effect July 1, 1874. On June 26, 1874, the injunction bond on which action was brought was given, and the injunction was dissolved July 16, 1874, fifteen days after the act changing the effect of the bond went into force. In other words, the relation of the statute and the contract were precisely what they are in this case. The statute was first enacted, to go into force at a future day, then the contract made, operating a short time before the statute went into effect and a longer time after the statute went into effect, suit was brought on the contract and an attempt made to apply the statute to it. The court says (p. 44):

"As the act had been passed when the bond was executed, although it was not to go into effect until afterward, July 1, 1874, it is said that, as the obligors knew that a change in

the remedy on injunction bonds would go into effect July 1st, after, the law became part of the contract. *But although passed before, as the statute was not to go into effect until July 1, 1874, it was, until that time, as no statute,* and cannot be admitted to have any effect on the bond in question."

* * * "By the bond itself, then, there is no liability here, because there was no award of damages previous to the institution of the suit, and to admit a liability by force of the statute of 1874 would be to give that statute a retrospective operation, and impose a liability, under a previous contract, where without the statute no liability existed. This cannot be done; it would do more than affect the remedy—*it would affect the obligation of the contract* by creating a liability where none at the time existed."

Justice DICKEY dissents, saying:

"At the time of the execution of the bond, the statute of 1874 had been enacted, though no operation could be had until July 1, 1874. The contract was made in view of that act thus enacted, and was to be performed after July 1st, and the breach occurring after that act was in force, I think the case comes within the provision of that statute."

Judge SEAMAN held the same views as to the effect of the statute in the present case upon the contract between the Diamond Glue Company and the United States Glue Company as appears from these words of Justice DICKEY. It is, therefore, evident that the same arguments were used in *Mix* v. *Vail,* as prevailed in the Circuit Court in the case at bar, but the Supreme Court of Illinois, by a majority of six to one, and in very decided opinion, held this argument unsound.

The opinion of the court in *Mix* v. *Vail* makes it clear that the statute cannot be applied to a contract made after the enactment of the statute but before it becomes a law, except by giving the statute some operation during that time. The Circuit Court did this, yet the statute itself provided

that it should not "go into operation" until September 1, 1898, after the contract was made.

But *Mix* v. *Vail*, although directly in point, was not as near in its facts to the case at bar as was some litigation concerning a statute of Indiana regulating the conditions on which foreign building and loan associations might be allowed to do business in Indiana. This statute was approved March 3, 1893, and was in force by its terms April 1, 1893. (Although there seems to be some doubt as to whether, on account of constitutional provisions, it was in force before May 18, 1893.) See Laws of Indiana, 1893, p. 274.

This statute came before the Indiana Supreme Court in the case of *Security Savings Association* v. *Elbert*, 153 Ind., 198, a suit to foreclose a mortgage given to a Minnesota building and loan association in Indiana, on Indiana property, by a resident and citizen of Indiana, who, as a part of the contract, became a stockholder in the Minnesota association, the plaintiff, on the usual terms, that is, on making payments from time to time on his stock, and paying interest on his loan, etc. The business of taking defendant's subscription and making the loan to him was done through a resident agent. The association did not comply with the said act of 1893 and this fact was set up in defense. In regard thereto the opinion of the court (p. 203) was as follows:

"The act of 1893 decreeing that it should be unlawful for a foreign corporation to do a building and loan business in this State until it should have deposited bonds, etc., must be read prospectively, if possible: *must be read as not impairing the obligations of existing contracts, to be constitutional.* To meet these requirements the act must be construed to mean that the business which may not be lawfully done, until the terms are complied with, is the making of new contracts, the issuance of new shares, and the execution

of new loans. *If a contract is valid when executed which contemplates the lapse of several years before all its terms are carried out, it must be held to remain valid and enforceable to the end under the laws* IN FORCE *at the time of its execution, no matter what changes the law has undergone in the lifetime of the contract.*"

This case, of course, did not involve a contract made during the period between the enactment and going into force of the statute, but in the same volume is found the case of *National Home Building & Loan Association* v. *Black*, 153 Ind., 701, which case is precisely similar to the Elbert case except that Black became a stockholder and obtained his loan March 25, 1893, *three weeks after the statute had been enacted, but before it went into effect.* The court held, nevertheless, that the act, although enacted before the contract was made, had no effect upon the contract because it did not go into force until after the execution of the contract, saying:

"It will be observed that the note and mortgage sued upon were executed after said act of 1893 took effect. It follows that this case is ruled by *Security, etc., Association* v. *Elbert, Ante*, 198."

We have not been able to find any other cases involving this precise point—the applicability of a statute to a contract made before the statute goes into force, but after its enactment,—but these cases both decide squarely that such a statute cannot affect the obligations of such a contract, and this on two grounds: that so to apply the statute would (1) make it retroactive, since it can only speak from the time it goes into force, and would (2) impair the obligations of a contract.

It must be borne in mind that the Wisconsin statute pleaded in this case was not designed to change the substantive law as to contracts of this nature, nor to forbid for-

eign corporations to make this sort, or any sort, of contracts in Wisconsin; so that any suggestion, absolutely baseless in fact, that the Diamond Glue Company made this contract to evade the statute, is absurd.

Had the law in force in Wisconsin on June 25th, 1898, made such a contract absolutely void, it would hardly be contended that compliance by the Diamond Glue Company with Section 1770b on or after September 1st would of itself validate the contract. How, then, can the lack of such compliance invalidate a contract valid when made?

If the Wisconsin legislature had intended to enact that this statute should be read into all contracts made after its enactment, but should not otherwise be in force until September 1st, 1898, it would have been easy so to provide. But no such provision was made. Reason and authority, therefore, unite in treating the statute as if enacted September 1st, 1898.

The reason for providing that a statute shall not be in force until some future time is to give all persons a chance to become acquainted with its provisions by that time. But this precaution is entirely nullified if a statute is to be held to affect the performance of contracts entered into at any time after the enactment, for persons then are in effect obliged to know the provisions of a statute the instant it is approved, or they may find an advantageous contract turned into a ruinous one because of conditions annexed to its performance by laws not in force at its execution. It may be said that in the case of this contract there was ample time to learn the provisions of the statute, but surely the case would not be different had the contract been concluded the instant after the statute was approved. The courts are not at liberty to pick out some time between the enactment and

the going into effect of a law, when parties are bound to take notice of it.

There is another consideration which will show the fallacy of defendant's argument that a lack of compliance with the statute by the Diamond Glue Company released the defendant from the contract.

It must be admitted, as it was admitted by the learned judge of the Circuit Court, that the contract was valid when made and that the only duty of the plaintiff was to file its articles with the secretary of state as soon as the law went into effect. It will not, we think, be denied that the filing of these articles and paying the fee before the statute went into effect would have been nugatory; because before the time the contract went into force the secretary of state had no authority to accept the fees or the articles of incorporation. (*Commonwealth* v. *Fowler*, 10 Mass., 290.) Now, therefore, in order to comply with the statute the Diamond Glue Company must have acted after the statute went into effect; that is, some time after midnight, August 31st, 1898. Then between the hour of midnight of August 31st, 1898, and the time in September 1st, 1898, when the secretary of state might have his office open for business, the Diamond Glue Company would necessarily be breaking the statute and just as necessarily the United States Glue Company would be relieved from its contract. In other words, following the defendant's argument to its logical conclusion, the effect of the statute was necessarily to release the United States Glue Company from its contract with the Diamond Glue Company, and to make it impossible that any foreign corporation could make any binding contract after the passage of Section 1770b and before September 1st, 1898, to be performed thereafter.

It may be answered that this is an absurd construction of

the statute; that it must be construed reasonably, and the Diamond Glue Company must have been given a chance to comply with the statute. But there must have been some instant when, if this statute were to affect the operation of the contract, it would do so. That instant can be no other than the instant the statute goes into effect. If the question of the plaintiff's intention is to enter into the case, then it must be shown that the plaintiff willfully refused to comply with the statute, and the defendant must fail in its case, for there is not a scintilla of evidence to show that any of the officers of the plaintiff were aware, or, for that matter, had any cause to believe that the plaintiff was doing business in Wisconsin; nor, indeed, is there anything to show that they were aware of the existence of the statute. Certainly the defendant did nothing to inform them of the statute; its complaints being entirely directed to the alleged failure of the Diamond Glue Company to carry out the contract, thus impliedly asserting all the time that the contract was valid; demanding performance of the very acts which it now claims could not be lawfully performed by the plaintiff or accepted by it.

III.

The interstate commerce clause of the Federal Constitution forbids the application of the Wisconsin Statute to the performance of the contract in question, and if the Wisconsin Statute properly interpreted embraces the performance of this contract, then it is so far void.

The contract as interpreted by the parties, and its performance as shown by the evidence, were wholly concerned with interstate commerce. At the time of the breach by the defendant, all that the contract required on the part of the Diamond Glue Company was, that it, an Illinois concern,

should, from its Chicago and other offices (all outside of Wisconsin) (Rec., pp. 11, 42) sell the product of this Wisconsin factory, to be shipped to various parts of the country. The only unexecuted part of the contract, as the parties interpreted it, on the part of the plaintiff was the selling by it of the product of the factory for commissions to be paid by defendant. The market for this product was looked for outside of Wisconsin. The contract did not require the Diamond Glue Company to maintain sales agents or an office in Wisconsin, and, in fact, all the actual sales were made at the main office of the Diamond Glue Company, or at its branch offices outside of Wisconsin. (Rec., pp. 42, 44.) It is well settled that transactions of this character are interstate commerce, and their control is beyond the province of state legislatures, whether they are carried on by corporations or by individuals.

In the concurring opinion of Justices MATTHEWS and BLATCHFORD in *Cooper Manufacturing Co.* v. *Ferguson*, 113 U. S., 727, 736, occur these words:

"In the present case, the construction claimed for the constitution of Colorado, and the statute of that state passed in execution of it, cannot be extended to prevent the plaintiff in error, a corporation of another state, from transacting any business in Colorado, which, of itself, is commerce. The transaction in question was clearly of that character. It was the making of a contract in Colorado, to manufacture certain machinery in Ohio, to be there delivered for transportation to the purchaser in Colorado. That was commerce; and to prohibit it, except upon certain conditions, is to regulate commerce between Colorado and Ohio, which is within the exclusive province of Congress. It is quite competent, no doubt, for Colorado to prohibit foreign corporations from acquiring a domicil in that state, and to prohibit it from carrying on within that state its business of manufacturing, but it cannot prohibit it from selling in Colorado, by contracts made there, its machinery manufacturede elsewhere, for that would be to regulate commerce among the States."

It was there held that a contract, made in Colorado, for the manufacture of machinery in Ohio to be delivered in Ohio for transportation to Colorado was interstate commerce. *A fortiori*, the making of a contract in Chicago for the shipment of glue from Wisconsin to various outside points, is interstate commerce. All the other provisions of the contract between plaintiff and defendant were simply preparatory to, and designed to facilitate this commerce, and were dependent upon it, and as interpreted by the parties to the contract did not contemplate the maintenance of any agents in Wisconsin by the Diamond Glue Company. The whole object was to sell the glue and grease from Chicago, and the provisions concerning the furnishing a superintendent, giving the United State Glue Company the benefit of advice, etc., in making plans, the greater part of which were carried out outside of Wisconsin at any rate, were merely incidents to this commerce. For that matter, contracting to furnish the superintendent was in itself a matter of interstate commerce. Contracts concerning the sending of persons across state lines are considered interstate commerce as much as the sending of goods. *McCall* v. *California*, 136 U. S., 104, 108.

In *Robbins* v. *Shelby Tax District*, 120 U. S., 489, 494, it was held that the statute of Tennessee enacting that all drummers should be required to pay a license fee was unconstitutional so far as applied to persons doing business on behalf of concerns located in other states, inasmuch as such business was interstate commerce. If it is a regulation of interstate commerce and therefore unconstitutional to tax drummers from outside of the state, traveling in the state where the tax is laid, an act which interferes with the selling of produce inside of a state by a house situated outside of the state is certainly as invalid. See, also, to the same effect, *Corson* v. *Maryland*, 120 U. S., 502.

Certainly if the representatives of a corporation of one state may travel in another for the purpose of there selling goods of the corporation, and may do this without leave or license and contrary to the will of the legislature of the second state, it is not merely interstate commerce itself that is legalized by the United States Constitution, but all things incidental to it. For instance, it will hardly be denied that such traveling salesmen, even when acting for corporations, have the right to purchase meals, arrange for lines of travel from point to point within the state, and do all necessary things, or things which to them might reasonably appear to be necessary in the prosecution of the purposes of interstate commerce. And as long as their principal purpose is the furtherance of interstate commerce it makes no difference whether the means chosen by them are absolutely necessary to that end or not. Likewise, as the chief end and aim of the contract in question was the doing of interstate commerce and as the compensation expected by the Diamond Glue Company was to come out of such commerce, it was certainly proper for the Diamond Glue Company, without any regard to any state legislation, to agree to give, and to give, the United States Glue Company such advice and information in regard to the manufacture of glue as were likely to enable the Diamond Glue Company to make larger and better sales of that glue. In *Milan Milling and Manufacturing Co.* v. *Gorten,* 93 Tenn., 590, it was held that it was an act of interstate commerce for a foreign corporation to sell and *set up* machinery in a state where it had no agents or office. Of course it might not have been considered interstate commerce for a foreign corporation to send agents into the state for the purpose of setting up machinery already there, but when the setting up of the machinery was merely incidental to the conduct of

interstate commerce the whole matter is held to be protected. So here, while it would not be considered interstate commerce for the employes of the Diamond Glue Company to give advice in Wisconsin as to the running of the glue factory there if that was the only connection that the Diamond Glue Company had with such factory, yet when such advice is given in performance of a contract concerning interstate commerce and such acts are fairly interpreted as in furtherance of such commerce, they certainly are protected along with the commerce, which is the object of the contract.

IV.

The Wisconsin Statute, even if constitutional and applicable to the contract between these parties, was misapplied by the Circuit Court.

The Circuit Court and the United States Glue Company both relied for their construction of the act upon *Aetna Insurance Co.* v. *Harvey,* 11 Wis., 394. This case is authority for the rule that if a Wisconsin statute affixed a penalty to the doing of an act, the act itself is thereby proclaimed illegal and no civil rights can grow out of it. The legislature is presumed to have intended that affixing a penalty to the doing of an act should have this effect. Such a presumption will of course not be indulged where it is inconsistent with the apparent purpose of the statute securing the penalty, when that statute was regarded as a whole. Especially is that true where, as in the statute in question, the legislature has carefully defined the precise extent to which it designed the statute to affect contracts and contract rights.

The legislature clearly expressed its meaning in regard to the bearing of this statute on contract rights as follows:

"Every contract made by or on behalf of any such association, company, corporation or copartnership affecting the personal liability of or relating to property within this state before it shall have complied with the provisions of this section, shall be wholly void on its behalf and on behalf of its assigns, but shall be enforcible against it or them."

This must be read in connection with the provision that the statute should go into force September 1, 1898. Until September 1, 1898, there could be no chance of complying with the statute and therefore the contract in suit, which was made June 25, 1898, cannot be of itself a violation of this statute. So much was admitted in the Circuit Court, both by the learned judge and by counsel for the United States Glue Company.

But the legislature in providing that contracts made by a corporation before its compliance with the statute and (necessarily) on or after September 1, 1898, should be void, has by clear implication allowed all other contracts to be valid and enforcible.

The contract was fairly made between business men on either side; its provisions were fully carried out by the Diamond Glue Company until the United States Glue Company declared itself no longer bound, having then obtained the greater part of the benefit of the contract. Under such circumstances the court should not be swift to allow a defendant to escape its obligations by setting up a statute, which, if it was broken, the defendant assisted in breaking and which it never called to the attention of the plaintiff.

The leading case of *Harris* v. *Runnels*, 12 Howard, 79, is instructive in this connection. That was a suit upon a note given as part of the purchase price of certain slaves. The defense was that the plaintiff brought the slaves into the State of Mississippi as merchandise in contravention of

the statute which regulated their importation, and it was contended that the plaintiff could not recover because he failed to comply with the statute before selling the negroes. The sixth section of the statute imposed a fine of one hundred dollars on both the seller and the buyer of such slaves.

The court considered the question with great care as to whether the imposition of the fine for the transaction avoided any contract growing out of it, and after reviewing the English authorities they say (page 84):

"Before the rule can be applied in any case of a statute prohibiting or enjoining things to be done, with a prohibition and a penalty, or a penalty only for doing a thing which it forbids, the statute must be examined as a whole, to find out whether or not the makers of it meant that a contract in contravention of it should be void, or that it was not to be so." * * * "That legislators do not think the rule (that the contract is void) one of universal obligation, or that, upon grounds of public policy, it should always be applied, is very certain. For, in some statutes, it is said in terms that such contracts are void; in others, that they are not so. In one statute, there is no prohibition expressed, and only a penalty; in another, there is prohibition and penalty, in some of which, contracts in violation of them are void or not, according to the subject-matter and object of the statute; and there are other statutes in which there are penalties and prohibitions, in which contracts made in contravention of them will not be void, unless one of the parties to them practices a fraud upon the ignorance of the other. It must be obvious, from such diversities of legislation, that statutes forbidding or enjoining things to be done, with penalties accordingly, should always be fully examined, before courts should refuse to give aid to enforce contracts which are said to be in contravention of them."

In accordance with this line of reasoning the court examined the Mississippi statute carefully and came to the conclusion that the proper interpretation of the statute did not render the contract growing out of the prohibited transactions void.

Similar careful examination of this statute and its possible effect will show, not only a case for the application of the rule of *expressio unius exclusio alterius*—that inasmuch as the statute expressly avoids contracts made after September 1, 1898, in so far as they benefit foreign corporations, provided the law was not complied with, such an express avoidance is equivalent to implied authorization of all other contracts—but also that the construction contended for by the defendant would give the curious result that the continuance of the obligations of the contract after September 1, 1898, would depend entirely upon the voluntary act of the plaintiff. So that, if the defendant's contention is right and the contract happened to appear on September 1, 1898, against the plaintiff's interests, plaintiff would only have had to fail to comply with the law and throw up the contract, excusing itself for its inability to perform the contract on account of the statute.

A statute should not receive a construction leading to an absurd result. Nor will courts forfeit contract rights of parties on any doubtful construction of a statute. We submit, therefore, that the Circuit Court erred in holding that the Wisconsin legislature intended to avoid contracts made before the statute—section 1770b—was in force, in addition to inflicting the penalty there provided.

Other language in the opinion in *Harris* v. *Runnels* is interesting as pointing out an additional reason why courts in this class of cases should be loth to interpret a statute in such a way as to release parties from their obligations. We quote from page 85 of the opinion:

"For aught that appears in the pleading, the defendant bargained for the negroes, knowing that they were brought into the state as he says they were. If, then, there was a violation of the law by his purchase, he stands *in pari de-*

licto with the seller, with this difference between them, that he is now seeking to add to his breach of the law the injustice of retaining the negroes without paying for them."

So in this case, the defendant, according to its own contention, not only assisted and urged the plaintiff to violate the law from the first of September, 1898, until the first of December, 1899, but having obtained the benefit of the knowledge and experience of the plaintiff in the erection of the glue factory, having had plans drawn for that factory in the plaintiff's office, now seeks to escape from payment, in the way specified by the contract, for this knowledge and experience and trouble, and adds to this supposed breach of positive law the undoubted and unblushing moral delinquency of seeking to hold the benefits of the contract without carrying out its part, even pushing this defense to protect it from the payment of over $1,600 in commissions admittedly earned by the Diamond Glue Company in selling its product.

V.

Where parties to an agreement have by their acts put a practical working construction on it, such a construction controls, unless directly opposed to the plain meaning of the agreement.

The whole strength of the defense in this case rests upon the contention that the contract between the parties gave the Diamond Glue Company real control of the United States Glue Company's factory. We think this question immaterial, for the reason that, supposing the Wisconsin statute valid, and controlling this contract, its applicability to the case at bar would depend upon what the parties actually did and not the things they had agreed to do before the statute went into effect.

But, supposing the mere provisions of the contract to be of importance, they did not, as interpreted by the parties, give to the Diamond Glue Company such powers over the United States Glue Company's factory as was taken for granted by the learned judge of the Circuit Court. The only parts of the contract bearing on this question are the following:

"It is further agreed that the party of the second part (Diamond Glue Company) shall have the management of the manufacturing in said factory and shall operate same for the party of the first part and furnish a superintendent, whose salary shall not exceed $150.00 per month, to the party of the first part, and that party of the second part, by its officers, shall give said factory such personal supervision as may be necessary from time to time in the operation of the same, and said officers will give party of the first part in the management and operation of the said factory the benefit, at all times during the life of this contract, of the experience and knowledge of said officers and their company.

"Party of the second part agrees to keep said factory supplied with a capable superintendent at all times during the life of this contract, whose salary shall not exceed the amount hereinbefore stated.

"It is further agreed that party of the second part shall control, handle and sell the entire output, including glue and by-products of said factory, and all such products shall be billed and sold as the product of the United States Glue Company, but it is agreed that all invoices shall be stamped 'Diamond Glue Company, exclusive sale agents.'" (Rec., 76.)

Of course the first four lines of this part of the agreement standing by themselves would seem to contemplate that the Diamond Glue Company should have the actual control of the factory and should be in possession of it by its officers or agents; but the next clause provides that the Diamond Glue Company shall furnish the United States Glue Company a superintendent, who is to be paid $150 per

month by that company, which is inconsistent with the idea of the actual operation of the factory by the Diamond Glue Company. The contract then goes on to state that the officers of the Diamond Glue Company will give such personal supervision as shall be necessary from time to time in the operation of the factory, thus further showing that it was not the intention of the contract that the factory should be in charge of the Diamond Glue Company. Then the contract further provides that these officers shall give to the United States Glue Company "in the management and operation of said factory" (by the United States Glue Company) "the benefit of their experience and knowledge."

There is the further provision that the Diamond Glue Company shall control, handle and sell the entire output of the factory and that the invoices shall be stamped "Diamond Glue Company, Exclusive Sale Agent." This only means that the Diamond Glue Company shall have the exclusive right to sell the product of the factory, and this certainly does not by any necessity contemplate "doing business" in Wisconsin by the Diamond Glue Company.

It is evident, we think, that any fair reading of the contract would make it at least extremely doubtful whether the contract looked to the exercising of any actual direct control over the factory by the Diamond Glue Company. Whether it amounted at the most to anything more than an agreement by the Diamond Glue Company to advise the United States Glue Company and to furnish them a capable superintendent, whom they, however, should pay, and a covenant by the United States Glue Company to abide by the advice of the Diamond Glue Company. But, however that may be, this contract was not broken until it had been performed by both parties nearly a year and a half. During this time there was no dispute as to the proper scope of each party's

control over the factory or its product. Without a question the factory was managed and operated by the officers and employes of the United States Glue Company alone. The officers of the Diamond Glue Company did not give a single command in connection with the management of the factory or the handling, in a physical sense, of its product. (Rec., 57, 62, 69.) The United States Glue Company never requested the Diamond Glue Company to do anything more than to give advice and sell the product of the factory. (Rec., 59.) More than that, it evidently would have prevented the Diamond Glue Company from attempting to exercise any control over the factory or over its product, except as sales agent of the product. This was the construction put on the contract by both parties in common. Such construction the court will adopt.

Chicago v. *Sheldon*, 9 Wallace, 50, was a stockholders' bill to enjoin the collection of a special assessment on the property of the North Chicago Street Railway Company. The important question in the case was the construction of the ordinance giving the company permission to lay a street railway in certain streets. On this point this court said (page 54):

"In cases where the language used by the parties to the contract is indefinite and ambiguous and hence of doubtful construction, the practical interpretation by the parties themselves is entitled to great, if not controlling influence. The interest of each generally leads him to a construction most favorable to himself, and when the difference has become serious, and beyond amicable adjustment, it can be settled only by the arbitrament of the law. But in an executory contract, and where its execution necessarily involves a practical construction, if the minds of both parties concur, there can be no great danger in the adoption of it by the court as the true one." See, also, *Lumber Co.* v. *Stump*, 30 C. C. A., 260, 264.

Winchester v. *Glazier*, 152 Mass., 316, 323, was a case

brought for the settlement of partnership accounts. The important question in the case was whether the allowance to one of the partners by the terms of the partnership contract of a salary of $2,500, to be paid half-yearly, apparently out of the profits, was to be made during the half years when there were no profits. It appeared that the other partner had not objected to the drawing of this salary by his partner during the half years when there were no profits. The court therefore held that the parties had put a construction on the contract which the court would follow. The opinion says:

"It is a general rule for the construction of written instruments, including deeds and contracts, statutes and constitutions, that when the language is open to doubt, and parties whose interests are diverse have from the outset adopted and acted upon a particular construction, such construction will be of great weight with the court, and will usually be adopted by it." Citing among other cases, *Chicago* v. *Sheldon, supra.*

This case is directly in point. Neither the United States Glue Company nor the Diamond Glue Company for a moment regarded their contract as giving up the factory to the control of the Diamond Glue Company. From the very first the United States Glue Company assumed actual control of the property; its officers gave the orders, its men did the work. It would be a strange theory of law that would allow the defendant, after acting on one interpretation of the contract, suddenly to turn around and take advantage of a construction of the contract to which it has paid no attention, in order to defeat an action brought in good faith on the contract.

As is evident from the cases cited above, the rule that courts will follow the construction put upon the contract by the parties themselves, is not confined to nonessentials, but goes to the very essence of the contract itself.

The case of *Topliff* v. *Topliff*, 122 U. S., 121, 131, is a good illustration. This was a bill in equity brought by John Topliff and others to restrain the infringement by Isaac Topliff of a certain patent granted in 1875 for an improvement in buggy tops. Isaac Topliff in 1870 had obtained a patent relating to the same subject and he then entered into an agreement with John Topliff and the others by which it was agreed that they should have the exclusive right to use his patent for five years, after which time all parties were to share in the use. The contract further provided that any improvements made by either party should be for the mutual benefit of all. After this contract was made Isaac's patent was found to be of no practical value, and he thereupon took out an additional patent in 1871 under which John Topliff and those associated with him manufactured up to 1879, paying Isaac the royalties provided for in the contract of 1870. In 1879 Isaac Topliff started to manufacture buggy tops, using both his patent of 1871 and John Topliff's patent of 1875. The suit was brought to restrain the use of this latter patent. This court held that the parties had by their acts construed the contract of 1870 so as to include in it the patent of 1871 instead of the patent of 1870, on which the royalty was to be paid, and also so as to regard the patent of 1875 as one of the improvements provided for in the contract, and that the court would follow the construction put upon the contract by the parties, and the bill was therefore dismissed.

VI.

The Diamond Glue Company was not doing business in Wisconsin contrary to the terms of the statute.

As stated before, the contract was made in June, 1898, two months and more before the statute that is claimed to apply took effect. The contract contained no provision looking to the breaking of any law of the state and was, when it was made, a perfectly valid agreement. Therefore, whether or not the existence of the contract before the statute went into effect was sufficient to legalize its performance in spite of the statute, in no view can the contract or its terms have any bearing on the question whether the Diamond Glue Company was violating this statute. The question of its violation cannot be determined by the *rights* of the Diamond Glue Company under the contract, but only by what the Diamond Glue Company *actually did* after the statute went into force. In other words, the contention of the United States Glue Company must be: "The Diamond Glue Company in performing this contract on which they are suing *are now* and have been violating a statute of Wisconsin. We cannot be required longer to assist in this violation. Therefore, we have a right to break the contract." It will not do for the United States Glue Company to say: "The provisions of this contract require or may require the Diamond Glue Company to do things in the future which they cannot do now without violating the statute, therefore we refuse now to proceed further with the contract." For a complete answer to that is: "You cannot know but that before the actual performance of these things becomes necessary on the part of the Diamond Glue Company, the Diamond Glue Company will have filed its charter and

complied with the other conditions of the statute, and therefore made its legal performance possible."

Yet the decision of the learned judge of the Circuit Court (Rec., 110) in taking the case from the jury proceeded solely on the ground that the *contract* gave the Diamond Glue Company *the right* to dictate the policy of the factory. That is, he held the statute infringed not by *acts* of the Diamond Glue Company, but by the mere *existence of the contract right* to do acts which if done before compliance with the statute would, he thought, be violations thereof. It could hardly be claimed that the Diamond Glue Company could be fined for the existence of this right. Yet if the company could not be fined therefor, the existence of the right is not a breach of the statute and afforded no excuse to the defendant for refusing to carry out its contract.

Suppose, for instance, the contract had provided in explicit terms that after January 1, 1901, the factory should be turned over to the Diamond Glue Company and the United States Glue Company cease to concern itself therewith, but the Diamond Glue Company should run it on joint account, could it be claimed that in such a case the United States Glue Company would have a right to declare the contract at an end on December 1, 1900, because the Diamond Glue Company had not then complied with the statute? And is the case any different because the contract grants the right to the Diamond Glue Company to assume the management at any time; which right it does not attempt to exercise? As long as the act which, it is claimed, would be a breach of the statute, is not done it cannot be said that the corporation will not have qualified for its legal performance before doing it.

The case most like the present one, on this question of the effect of a contract which gives a corporation certain

rights, on the question whether that corporation is actually doing business in a particular state, is the *United States* v. *American Bell Telephone Co.*, 29 Fed., 17.

This was a proceeding in equity. The question was whether the court in Ohio had jurisdiction over the defendant, a corporation of another state. It being necessary in order to maintain jurisdiction that the defendant should be doing business in Ohio. It appeared that the defendant, the Telephone Company, had a certain contract with the local company which gave the defendant the right, in certain contingencies, to take and operate the local lines, and it was contended that the provision showed that the defendant was doing business in Ohio. The court says (page 38):

"For its protection, the American Bell Telephone Company has, by the terms and provisions of these contracts, reserved important rights and powers, which in certain contingencies it may exercise, but which, as the plea distinctly avers, have never been actually exercised by it. The plea sets forth what has actually been done under the contracts.

"Whether the American Bell Telephone Company is carrying on business in Ohio must be determined by *what it has done, or is doing, rather than by what it may hereafter do*, in the event the local companies should make default in complying with the provisions of the contracts. The right reserved to take possession and carry on the business of telephony in Ohio, on the contingency of the local corporation's failure to observe and perform the terms and stipulations of the license contracts, certainly does not constitute a present carrying on of business by the American Bell Telephone Company, such as would bring it within the provisions even of the Ohio statutes. When the Bell Company exercises its reserved rights and powers under the contracts, and takes possession of the telephones, lines, etc., in Ohio, and operates the same through agents or officers of its own, it may then with some propriety be said to carry on its business in the state, so as to be amenable to suit here under the Ohio statute relating to suits against foreign corpora-

tions, but not before." And later on in the same opinion (page 41) we find the following: "The existence of these contracts, with the rights conferred upon the licensee or lessee, and the rights and powers, however large, reserved to the licensor or lessor, does not constitute the carrying on of business in Ohio by the American Bell Telephone Company."

This quotation expresses in apt language the correct view of this question. It seems almost too clear for argument that the existence of a contract right cannot be in itself a doing of business; that the question whether a corporation is doing business in a state at a certain date must be determined solely by what, if anything, the corporation is then doing in the state, and cannot be affected in the slightest degree by what the corporation may, according to some private contract, have the right to do.

The case of the *American Loan and Trust Company* v. *East & West Ry. Co.*, 37 Fed., 242, 245, was a suit brought to foreclose a trust deed by a foreign corporation, trustee in the deed. The trustee had not complied with the provisions of the Alabama Foreign Corporations Act, which forbade "doing any business" without such compliance. The trust deed provided that upon default in its conditions the trustee might take possession of the railway and operate the same. The court holds that such provisions in the trust deed, even after default, does not show that the trustee is doing business in Alabama unless it is further shown that the trustee is, *as a matter of fact*, in possession of and operating the railroad.

The learned judge of the court below said in his opinion that the Diamond Glue Company "had the dictation of the policy of the factory," and, therefore, was "doing business" in Wisconsin. Even if the contract, construed in the light of its performance by the parties, should be held to give

the Diamond Glue Company the right to dictate the policy of the factory, still the evidence shows absolutely without doubt that the Diamond Glue Company never did dictate the policy; that the utmost that it did was to advise the officers of the United States Glue Company as to the proper conduct of the factory. But, suppose the Diamond Glue Company had dictated the policy of the factory, this was surely not "doing business" in Wisconsin. If a Chicago company agrees to run its factory in accordance with the direction of a New York company, and does so, nevertheless this is certainly not doing business in Chicago by the New York company. The factory remains still the factory of the Chicago company as long as the Chicago company furnishes the building, the men, the material, gives from its office all directions in regard to the running of the factory, assumes the entire risk of operation, is alone responsible for the debts and expenses incurred, and has complete and absolute possession. In such a case would it not be farcial to bring criminal proceedings against the New York company for doing business in Illinois without a license from that State? Does not "doing business" in a state necessarily imply the presence in that state (for the purpose of doing the business) of some officer or agent of that corporation which is claimed to be doing the business?

The case of *Kilgore* v. *Smith*, 122 Pa. St., 48, 57, is directly in point. Kilgore, a citizen of Pennsylvania, was a member of a Maryland corporation called the Northern Hartford Packing Association. This association was incorporated for the manufacture and sale of canned and packed goods, etc. Persons becoming members of it (residents of Maryland and of Pennsylvania) subscribed among other things to these provisions: "No member of the company shall at any time or place pack any goods

which shall not be *under the control* of the board of directors of the company, and all goods packed by the members of this company shall be *subject to the control* of the board of directors of this company and for sale in such manner as they deem proper." They further agreed that at the end of the season the company should reckon up the average price obtained from such sales and pay its members 90 per cent. of this price for the goods which they furnished. In January, 1885, the company got into financial difficulties, owing Smith and others, appellees, considerable money. In consideration of this indebtedness it transferred a considerable quantity of canned goods, the subject of dispute, to the appellees. These goods were in part, at least, located in warehouses in Pennsylvania owned or controlled by the appellant Kilgore, who had packed and furnished them to the association. Upon demand of appellees Kilgore shipped some of these goods to them, but receiving no payment therefor, refused to ship others, when the appellees replevied them. The point for defense most pressed was that the appellees' vendor, the packing association, had never complied with the laws of Pennsylvania as to foreign corporations, and therefore could not be doing business in Pennsylvania and could not have acquired title to the goods when it sold to the appellees. Judgment was given for the appellees, and on appeal, was affirmed, the Supreme Court holding that as the Northern Hartford Packing Association had no capital invested in Pennsylvania, it could not be said to be doing business there, and was therefor not within the scope of the statutes.

Thompson in his work on Corporations, Vol. 6, par. 7936, says:

"The general conclusion of the courts is that isolated transactions, commercial or otherwise, taking place between a foreign corporation domiciled in one state and citizens

of another state, are not a doing or carrying on of business by the foreign corporation within the latter state; *but that these prohibitions are leveled against the act of foreign corporations entering the domestic state by their agents, and* engaging in the general prosecution of their ordinary business therein."

Scruggs v. *Scottish Mortgage Co.*, 54 Ark., 566. That was a suit brought to enjoin the sale of land under the power of sale in certain mortgages. The mortgagor lived in Arkansas and through a local broker forwarded to the mortgage company an application for a loan, which was accepted in Mississippi and the money turned over to the mortgagor's agent in Mississippi. The contract was held to be a Mississippi contract, even though it affected Arkansas land. And it was held that making such a loan was not doing business in Arkansas.

So giving advice, or even directions and commands—had and such been given—in Chicago as to the operation of a factory in Wisconsin was not doing business in the latter state. In order to show a doing of business in Wisconsin by the Diamond Glue Company it would be necessary to show that it had some agent in Wisconsin who was doing its business there. Writing letters in Chicago to another concern in Wisconsin, even had those letters contained directions that were carried out by this Wisconsin concern in its own interest—cannot possibly be held to be a doing of business in Wisconsin. And this is all that was done by the Diamond Glue Company at or about the time of the breach. For we have the positive testimony of its officers that when the United States Glue Company threw over the contract, the Diamond Glue Company *did not withdraw a single agent or employe, or a single bit of property of any nature from Wisconsin.* (Rec., 45, 57; see, also, Moorhead's testimony, p. 62.) In other words, the breach of the contract

did not put an end to any business done by the Diamond Glue Company in Wisconsin for the simple reason that in carrying out the contract *it was not engaged in business there.*

The court must ask: What did the Wisconsin legislature mean when it forbade foreign corporations to "transact any business" without compliance with the statute. The intention undoubtedly was to keep foreign corporations from entering into business in Wisconsin, not to render illegal any act of whatever nature done in Wisconsin on behalf of a foreign corporation. The statute must receive a reasonable construction.

Morgan & Co. v. *White*, 101 Ind., 413, was a suit by a foreign corporation against its agent, White, on contracts whereby the agent was to guarantee the payment of notes taken by him on behalf of the corporation. Plea was filed in abatement, alleging that the contracts were made by the corporation through its manager, S. C. Bartley, and that at the time they were made said agent had not complied with the Foreign Corporation statute of Indiana. On page 414 the court says:

"The provisions of the foregoing section in the statute are only applicable to persons who propose to engage in business within this state as agents for a foreign corporation. * * * It is claimed to be important in the section referred to that the agency contemplated was one which may have some degree of permanancy and involves transactions by an agent to conduct all the business of the corporation, who has some sort of residence or abode in the state. * * *

"The plea avers that the contracts of agency were executed in Benton County, but it does not aver that the agents who executed them for the company were 'doing business' or purposing to do business for the corporation in that county or anywhere else in the state."

"It does not appear that the appointment of the appellee's

agent was not the only transaction each ever engaged in or ever proposed to engage in, in this state; besides, we think the agents contemplated by the statute under consideration are such agents as propose to transact within this state *the business in which the corporation* is engaged, and that it has no application to persons who are engaged in appointing agents to do its business. *It may be necessary to appoint agents to do the business of the corporation, but appointing agents can hardly be said to be the business of any corporation in the sense of the statute.* This is plain from the reading of Sections 3022 and 3023, and that there might be no mistake about it, Section 3027 was enacted."

The decisions of the courts as to what constitutes doing business by a foreign corporation within a state show that it is not every act done on behalf of the corporation by its agent which will be regarded as doing business within the state. It must be some act in fulfillment of the purpose of the creation of the corporation. In other words, some exercise or attempted exercise of the corporate franchise and not some merely incidental act independent thereof. So in the leading case of *Beard* v. *U. & A. Publishing Company,* 71 Ala., 60, it was held that while the publishing company had an agent in Alabama to receive subscriptions to the newspaper which it was publishing in another state and to collect such subscriptions, "it was not doing business in Alabama." It was said (p. 62):

"There must be a doing of some of the works, or an exercise of some of the functions, for which the corporation was created to bring the case within that clause, and a railway, bank, or insurance company of foreign incorporation, performing its corporate functions within the limits of Alabama would be required to keep 'at least one known place of business and an authorized agent or agents' in this state. That would be doing business, the business or a part of it which fall directly within the purview of their corporate powers. The present case does not fall within the principle."

Sullivan v. *Timber Company,* 103 Ala., 371, was a suit

against a Florida corporation. The question in the case was whether the corporation was doing business in the county where it was sued. It appears that when the suit was commenced the company had an agent or employe in possession and care of the line of railroad it had constructed in Conecuh County, and in care of the machine which it had used in loading cars. This railroad and machine were adjuncts to the saw mill which the company had operated in another county. The operation of the mill had been discontinued and the railroad and machine were unemployed. The court says (page 380):

"The care and protection of unused property or the payment of taxes which are a charge upon the property, and the payment of which is essential to the preservation of the title to the owner, cannot be deemed as the exercise of corporate powers or franchises, nor the transaction of the business or any part thereof for which the company was created and organized.

"The real test is that in *Beard* v. *American Pub. Co., supra*,—is the corporation engaged in the transaction of business, or any part thereof, it was created and organized to transact? If it be it 'does business' within the meaning of the constitution. If it be not,—if the act it is doing or has done is not within its general powers and franchises, —it is not the business to which the constitutional requirement is directed."

So in this case—The Diamond Glue Company was not performing the objects of its incorporation in giving advice to the United States Glue Company as to the conduct of its factory. Such advice was merely incidental to the carrying out of the business for which the Diamond Glue Company was formed, which business was the manufacture, purchase and sale of glue, and the by-products of glue. (Rec., 73.)

This contention is given further point by a part of defendant's answer (Rec., 8) where it denies that the Diamond Glue Company was authorized "to superintend or agree to

superintend the construction of any factory or factories other than its own, or to act as broker, factor or sales agent." If this contention of the defendant is right—and they certainly are not the ones to assert the contrary—then, under this case, nothing that the plaintiff is alleged to have done in Wisconsin could be held to be "doing business" in the meaning of the statute. If the meaning of these words is correctly set forth in the *Beard* case—and that case has been widely cited and followed—then, giving advice, helping the other corporation to start and run its factory, sending them a superintendent and matters of that sort, however valuable to the other corporation, not being any part of the main business for which the Diamond Glue Company was organized, would not be doing business in Wisconsin.

The case of *Cooper Mfg. Co.* v. *Ferguson*, 113 U. S., 727, throws light on this question. The constitution of Colorado provides that no foreign corporation should do "any business" in the State without having a known place of business and an authorized agent. The statute of '77 provided that foreign corporations before permitted "to do any business in this State" should file a certificate with the secretary of state designating their principal place of business and authorized agent. The Cooper Manufacturing Company had made a contract in Colorado for the manufacture of certain machinery in Ohio, and its delivery in Ohio to the purchasers. The court says:

"The contention of the defendants in error is that the prohibition against the doing of any business in the state by a foreign corporation, except upon the prescribed condition, includes the doing of any single and isolated act of business whatever. Thus broadly stated, it is clear that the interpretation of the defendants cannot be sustained."

The court then quoted from the *Utley* v. *Clark-Gardner Mining Company*, 4 Col., 369, where the Colorado Supreme Court itself says in regard to the same provisions:

"It extends only to the exercise of the powers by which it" (the foreign corporation) "may be said to ordinarily transact or carry on its business."

The court after further noting that exceptions must be made in cases of interstate commerce then says "The prohibition against doing any business, therefore, cannot be literally interpreted." The court then, further construing the provisions of the Colorado statute and constitution requiring the statement of a place of business, etc., holds that these show that the idea of the statute was to apply to concerns regularly transacting business, and says (page 375):

"To require such a certificate as a prerequisite to the doing of a single act of business when there was no purpose to do any other business or have a place of business in the State, would be unreasonable and incongruous."

In the case of the Wisconsin statute the corporation is required to file a duly authorized copy of its charter and all amendments thereto which may be made "*while it shall continue to do business therein.*" This provision shows clearly that a continuance of business is contemplated. The majority of the court in the Ferguson case based their decision, which was that the demurrer to the defense of the statute should be sustained, squarely on the non-applicability of the statute to the making of the contract, without any regard to the question of interstate commerce.

In the case at the bar the court will note that there has been absolutely no attempt made by the Diamond Glue Company to carry on its usual business in the State of Wisconsin or to maintain an establishment there. The only things done by the officers or agents of the Diamond Glue Company in the State of Wisconsin after September 1, 1898, or, indeed, after the making of the contract, consisted in occasionally meeting the officers and employes of the United States Glue Company at Milwaukee or at the factory

and advising them as to the conduct of the factory. That certainly does not constitute an attempt to maintain a place of business in Wisconsin, or to transact the ordinary business of the Diamond Glue Company in Wisconsin.

VII.

The alleged offenses against the Wisconsin Statute by the Diamond Glue Company had no connection with the breach for which suit was brought. Any right to repudiate the contract growing out of these alleged offenses was waived.

The breach of this contract, for which suit is brought by the Diamond Glue Company, was the refusal of the United States Glue Company to permit the Diamond Glue Company to make further sales from the Diamond Glue Company's Chicago office of the product of the United States Glue Company's factory. That is, the breach was the refusal to permit the Diamond Glue Company to perform that part of the contract which it had the right to perform under any and all interpretations without any regard to the laws of Wisconsin. The United States Glue Company never refused to permit the Diamond Glue Company to do any of the things which could in any way be claimed to be a breach of this statute. It accepted performance of all these matters and then refused to permit the Diamond Glue Company to sell its glue and thereby to make the commissions for which it had bargained, when such sales could be conducted absolutely independent of any and all statutory requirements of the State of Wisconsin. Then when the Diamond Glue Company sued for this breach, the defendant replied that the Diamond Glue Company had in carrying out *other* parts of this contract violated the Wisconsin statute. Seldom has a less honest defense been interposed.

What difference can it make in a suit for a breach of certain provisions of a contract which could be carried out without any possible objections as to their legality, that the plaintiff in carrying out other portions of the confessedly valid contract, had *at former times* neglected certain precautions essential, as is claimed, to the legality of its actions in these other respects? Had the plaintiff been seeking to obtain possession of the control of the factory then this defense would have some relevancy, but when all the plaintiff was asking was to be allowed to go on and carry out its part of the contract in the State of Illinois, the answer that it had in other respects violated the law of the State of Wisconsin seems entirely beside the mark.

Inasmuch as the contract was not itself invalid it would seem evident that any acts of the plaintiff, in carrying out the contract, that were illegal would only have a bearing on the obligations of the contract in so far as they might be taken to be a breach of some implied conditions. Assuming that such alleged illegal acts of the plaintiff would amount to a breach of the contract, still, like any other breach, in order to justify the defendant in rescinding, it must be taken advantage of immediately. If the plaintiff with its headquarters at Chicago, its officers being all citizens of Illinois, must be charged with knowledge of the law of Wisconsin and so held to have offended against that law in performing this contract, though in what particular it has offended it would be hard to state, certainly the defendant, a Wisconsin corporation, all of whose officers were citizens of Wisconsin, must be charged with knowledge of the Wisconsin law and that all acts of the plaintiff which are claimed to be offenses against that law were offenses at the time they were done. No act of the plaintiff was a secret from the defendant. Whatever the plaintiff did in Wisconsin was done in con-

junction with the defendant. Therefore, when, if ever, the officers of the plaintiff in visiting defendant's factory and endeavoring to help defendant to get the factory running in good order and turning out a good quality of glue, were acting in violation of the Wisconsin statute, and so made a breach of some implied condition of the contract, then it was the defendant's business, if it wished to cancel the contract, to act at once. If anything, the court should be stricter in requiring the defendant to take advantage of a breach of this sort than of one committed knowingly by the plaintiff and actually hurting the defendant. But what did the defendant do? Evidently, being first advised as to the law by the same astute counsel who represented it in the Circuit Court, it not only did not complain of these breaches, but invited them, asking Mr. Freshman at times to come up to Wisconsin and look over the factory and see what was wrong. (Rec., 85.) It accepted the advantages accruing to it from these "offenses" against the statute, and it egged on the plaintiff to commit more of them. It kept back all complaint of them or any hint that they might by any chance be regarded as offenses. It attempted to obtain more favorable terms from the plaintiff than those which it had solemnly agreed to accept, and carried on negotiations for over a month in endeavoring to get the contract recast in its favor. Thus the defendant played a game of "heads I win, tails you lose," and threw dust in the eyes of the plaintiff's officers as to the claimed illegality of some of its acts while seeking to profit by negotiations which implied the complete legality of the acts of both parties.

Certainly no principle of law can justly sanction such dealing. Certainly the Wisconsin legislature in enacting their statute did not intend that it should be used as a cloak for fraud.

The only act of the Diamond Glue Company which in any way even resembled doing business in Wisconsin was sending their superintendent to the factory in July, 1899, to assist the United States Glue Company's superintendent for a few days. If this friendly act was so illegal as to absolve the United States Glue Company from all its obligations under the contract, they ought then and there to have refused to have any further dealings with violators of law, instead of continuing their contract relations for four months thereafter.

It is well settled law that if a party to a contract has a right on account of some act of the other party to repudiate the contract, such right is lost by calling for further performance of the contract, or doing any act inconsistent with repudiation of the contract or which would necessarily imply the continuance of it. So it is held in *Weeks* v. *Robie,* 42 N. H., 316, that any act amounting to ratification by one entitled to repudiate after a knowledge of the facts and circumstances of the case makes repudiation impossible

Herman in his work on Estoppel, Vol. 2, Sec. 1039, says:

"A man who has his option whether he will affirm a particular act or contract, must elect either to affirm or disaffirm it altogether; he cannot adopt that part which is for his own benefit and reject the rest. * * * He cannot treat a contract as subsisting and afterwards avoid it."

"§ 1040. Among the rules which have become axiomatic is one that a party must be consistent and not contradictory in the positions which he takes. In the language of Lord Kenyon, he must not 'blow hot and cold at the same time.' * * * If a voidable contract, or other transaction, is voluntarily acted on with a knowledge of all the facts, in the hope that it may turn out to the advantage of a party who might have avoided it, he cannot avoid it, when after abiding that event, it has turned out to his disadvantage. * * *

"§ 1043. Where a party to a contract, which might be impugned on the ground of fraud, knowing of the fraud, nevertheless elects to treat the transaction as a binding contract, he thereby loses his right of rescinding it; for fraud only gives a right to avoid or rescind a contract. A party cannot retain the benefit of a transaction and at the same time repudiate it as null and void."

"§ 1046. Where, by reason of a breach of conditions, a lease becomes forfeited, and the lessor is entitled to recover possession, he waives that right by the acceptance of rent, he cannot accept the rent and at the same time claim a forfeiture of the lease."

So in *Lawrence* v. *Dale*, 3 John. Ch., 23, 42, it is said:

"If the law allows a party to abandon contracts while *in fieri*, he ought at least to act promptly and decidedly, on the very first discovery of the breach. *If he negotiates with the party afterward and permits the work to go on he certainly waives all right to abandon.*"

"A municipal corporation will not be allowed to license an act to be done, and then collect the penalty for the doing of it as for an illegal act. *Volenti non fit injuria.*" *Genoa* v. *Van Alstine*, 108 Ill., 555.

It should be remembered that there is not a scintilla of evidence in the case to show that at the time the defendant refused further to carry out the contract, or for some time previously the plaintiff was doing a single thing of any nature whatever, in Wisconsin, in performance of the contract.

Supposing the Wisconsin statute instead of merely providing that it should go into effect September 1st, had provided that all contracts made before September 1st, calling for performance after that day, should be taken to be subject to the condition that the foreign corporation should, before doing anything in Wisconsin after September 1st, comply with the statute, and that if the foreign corporation did acts in Wisconsin without complying with the statute the other party to the contract might abrogate it.

Can it be supposed that in such case the said other party might wait until a year and three months after the statute went into effect, and some five months after any act by the foreign corporation in Wisconsin that could be construed as doing business, before abrogating the contract? Yet such a statute as we have supposed merely expresses all that the Circuit Court decided the statute in question implied. There is no illegality here about either the contract itself or the consideration for the contract. The only claim is that the performance of certain of its provisions, as the court construed them, was illegal after September 1, 1898.

Another view may be taken of this matter; the situation of the parties was this: The contract was valid. At the utmost all the plaintiff was called upon to do was to furnish plans, to give advice and information as to the operation of the factory, to sell the products of the factory—none of which were to be done in Wisconsin, and to operate the factory—which might be done in Wisconsin. Now the plaintiff is suing concerning the breach of the agreement that it should sell the glue, not on the agreement that it should operate the factory, so it is not attempting to enforce the agreement that it should operate the factory. That agreement has been lost sight of by both parties, or more probably was never intended literally by either party. Now, it is only this provision—that the plaintiff should operate the factory—whose performance would in any view violate the statute. That is the only act provided for in the contract which would constitute a *"doing business"* of any sort in Wisconsin. Yet, the plaintiff has never attempted to operate the factory, nor has the defendant evinced any desire, or even willingness that the plaintiff should operate the factory. How, then, can the plaintiff be said to have offended against the statute when the defendant has waived perform-

ance of the only provision of the contract which has any relation to the terms of the statute? If the defendant can waive performance by the plaintiff of the provision of the contract that it should have the management and operation of the factory, which we do not think can, or will be denied, it could certainly waive an implied provision that the plaintiff should comply with the statute in order to qualify itself for the management and operation of the factory which it is not expected to undertake. It would be absurd to allow the defendant to escape from a contract because the plaintiff was not ready to do something which the defendant not only did not ask the plaintiff to do, but showed by its conduct that it was unwilling the plaintiff should do.

There are undoubtedly a good many cases of which the above mentioned case of *Aetna Insurance Co.* v. *Harvey, supra*, is a sample, that hold that where a contract is made contrary to law the defendant may set up that fact in defense of a suit brought on the contract, even where he has himself acted under it. But those cases have no bearing on this suit. The reason for their decision is that such a supposed contract is *no contract at all*, being illegal, and therefore no rights can arise under it. Here the *contract was valid*. The law, it is said, subsequently gave the United States Glue Company the right to abrogate it. It did not exercise this right until the facts on which it was founded ceased to exist. During five months thereafter it treated the contract as binding and required its performance by the plaintiff; by doing so it lost its right, if it ever had it, of abrogation.

Let us look at the facts in relation to the doings of the Diamond Glue Company in November and December of 1900. The Diamond Glue Company had its headquarters in Chicago. It received reports from the United States

Glue Company's factory in Wisconsin twice a week. These reports showed the amount and quality of the glue and grease manufactured. Except from these reports it had no record or knowledge of the work of the factory. It had no control during this period between July and November (the only time the factory was in operation) "over the prices paid for the labor of that factory, over the character, quantity or prices of material or coal used, or over the nature and amount of the sundries charged." (Mr. Morron's testimony, Rec., 46.) Whatever the Diamond Glue Company did under this contract, it certainly did not operate the factory and so do business in Wisconsin.

It gave advice freely as to any of these matters when required or requested by the United States Glue Company or its officers; it stood ready, doubtless, at any time to carry out any part of the contract which the United States Glue Company might desire to have carried out; before doing anything that involved the transaction of business in Wisconsin, it is only fair to presume it would have filed its charter with the secretary of state. But in November and December of 1900 the Diamond Glue Company was *not doing* a single thing which required the consent of the State of Wisconsin, or which in any way came within the purview of Section 1770b, and, as we have shown, any former alleged violations, so far as they could be claimed to give the defendant the right to repudiate the contract, were waived.

We have established, we think, the following propositions:

That Section 1770b of the Wisconsin Statutes of 1898 is unconstitutional because it attempts to impose conditions on the making of contracts and doing business in Wisconsin

by partnerships and voluntary associations contrary to the provisions of the United States Constitution, and the statute being in so far unconstitutional, it is impossible to enforce the remainder of it without altering the legislative intent.

That the amendment of 1899 (made after the execution of the contract) did not make the statute constitutional, inasmuch as it still left it to include all volunary associations for business or pleasure (with certain limited exceptions) that were not ordinary partnerships.

That said Section 1770b, even if valid, has no bearing on the present suit because the contract on which suit is brought was executed before this statute went into effect—although, indeed, after its enactment—and therefore the obligations of the contract are protected by the United States Constitution.

That supposing the statute to have been invalid until the amendment of 1899 and then to have become valid for the first time, the rights growing out of the contract would be excepted from its operation, because in that case the contract was made before a valid statute was either enacted or went into force.

That all acts done by the Diamond Glue Company in execution of the contract after September 1, 1898, were acts in furtherance of interstate commerce and therefore were beyond the authority of the state legislature.

That laying all constitutional questions aside, the Diamond Glue Company at no time was doing any business in Wisconsin contrary to the provisions of the statute.

That even if the Diamond Glue Company was held at one time to have infringed the statute in the performance of this contract, thus giving, as it is claimed, the United States Glue Company the right to repudiate the contract, still,

that right, not having been exercised at the time of the breach of the statute, if any, by the Diamond Glue Company, was waived and could not afterward be taken advantage of by the United States Glue Company.

We respectfully submit that each of these propositions is true. But if only one of them be established then the Circuit Court erred in its application of the Wisconsin statute, and in directing a verdict for the defendant.

VIII.

The Diamond Glue Company in its dealings with other corporations did not break its contract with the United States Glue Company.

The judge of the Circuit Court, in his brief opinion given in support of his direction to the jury to find for the defendant, speaks as follows (p. 111):

"I have been * * * quite strongly impressed with * * * the showing of the doing of business by the plaintiff, notwithstanding the contract, with other parties, which, it seemed to me, would be a business necessarily in antagonism to that of the defendant's in this case, and, if so, that of itself would be a breach on their part which would authorize the setting aside of the contract by the defendant."

And he proceeds to say further that he does not rely on this; that it makes no difference to his ruling.

All the record shows on the subject of dealings with other manufacturers of glue is contained in Mr. Morron's testimony on cross and re-direct examination, pages 50, 52 and 53 of the printed record. From this it appears (Rec., 52) that the Diamond Glue Company, at the same time it

was acting as agent for the United States Glue Company, also sold glues as agent for the Foerderer factory in Philadelphia and the Fischer factory at Gowanda, New York. It also appears that the Diamond Glue Company had contracts with the companies operating these factories. That was all the testimony on the subject of the dealings with other manufacturers, and even from this testimony it appears that more of the United States Glue Company's glue was then sold than of either of the others.

It clearly appears from the evidence, however, both that the United States Glue Company knew that the Diamond Glue Company had contracts similar to theirs with other manufacturers and that the Diamond Glue Company expressly refused to contract not to sell other hide or calf glue. On June 22, 1898, six days before the execution of the contract in suit, Mr. Trostel, the vice-president of the United States Glue Company, wrote to the Diamond Glue Company (Exhibit 2, p. 74), enclosing a proposition for a contract between the two companies. The letter also contained these words:

"Knowing as you do that we are novices in the glue business, you will agree with us that it would be of material aid to us in getting up a contract if you would give us an insight into the contracts you have with *Foerderer and others with reference to the running of their glue factories,* which favor you will no doubt grant us."

Nothing could show more explicitly the fact that the United States Glue Company knew that the Diamond Glue Company had similar arrangements with other companies to that which was contemplated with the United States Glue Company.

The proposition referred to in this letter of Mr. Trostel's (Rec., 75) contained this paragraph:

"During the life of the agreement, beginning as soon as our factory is ready for operation, you are to refrain from making *or handling* either hide or calf glue."

Taking the place of this paragraph we have in the contract, actually executed six days later, the agreement "to refrain from *manufacturing* either hide or calf glue at any of their factories." In other words, the United States Glue Company asked the Diamond Glue Company to promise to give up selling other hide or calf glue and the Diamond Glue Company *refused* to make such a promise. Since it did not make the promise it can hardly be said to have broken it.

IX.

Even if the plaintiff were not entitled to recover damages for the defendant's refusal to abide further by the contract, nevertheless the instruction given to the jury was wrong, for the plaintiff showed a cause of action for the value of services rendered by it to the defendant.

It was admitted that the contract sued upon was of itself valid when made. It was not claimed there was anything illegal in the acts of the Diamond Glue Company in furnishing advice to the United States Glue Company, in drawing plans for its factory, in selling its produce. Therefore, even if the defendant was at liberty, as held by the Circuit Court, to declare the contract at an end, the plaintiff was then entitled to recover under its amended complaint (Rec., 26) for the value of the services it had rendered as on a *quantum meruit* at common law. For these services were rendered in part before September 1, 1898, when under no possible construction was the plaintiff in any default, and other services were rendered outside of the

State of Wisconsin in selling the United States Glue Company's glue and grease, and therefore could in no way be a violation of the Wisconsin statute.

The amended complaint asked both for damages for the breach of the contract and also for commissions earned in the sale of the glue and for the value of services rendered to the United States Glue Company. The complaint states there was due as commissions $1,698.48. The answer admits that there are unpaid commissions amounting to $1,639.13 (Rec., 15), but states they were not due or payable That these commissions were earned is shown in the evidence by the sales, a list of which is found on pages 103 to 106 of the printed record. Certainly the plaintiff made out a cause of action and substantiated its claim for commissions earned. Under the evidence it was a mere matter of computation from these sales to arrive at the right amount. If this amount, or any of it, were for any reason not due, it did not appear from the plaintiff's evidence and it is for the defendant to show. From page 52 of the printed record it appears that the Diamond Glue Company had sold for the United States Glue Company between July 26 to December 11, 1899, glue amounting to $18,167.90, which shows that the Diamond Glue Company became entitled to commissions for the sale of such glue alone to at least $1,816.79. Besides this a large quantity of grease was sold, as appears from Exhibit 41. (Rec., 103.)

The record shows that the officers of the Diamond Glue Company made many trips to Milwaukee before September 1, 1899, on behalf of the United States Glue Company, gave it advice freely, drew up plans for it, using the time of one of its men for about a month, and did various other acts in fulfillment of the contract, which in no way were violations of the Wisconsin statute. The Diamond Glue

Company was certainly entitled to recover the value of these services on the showing made, so that in no point of view of the law is there justification in fact for the instruction given to the jury to find for the defendant.

We respectfully submit that the judgment of the Circuit Court should be reversed and the cause remanded for a new trial.

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IN THE

Supreme Court

OF THE UNITED STATES.

OCTOBER TERM A. D., 1902.

THE DIAMOND GLUE COMPANY, *Plaintiff in Error.* vs. THE UNITED STATES GLUE COAMPANY, *Defendant in Error.*	In Error to the Circuit Court of the United States for the Eastern District of Wisconsin.

REPLY FOR PLAINTIFF IN ERROR.

Whether it was intended or not, the briefs filed on behalf of the defendant in error avoid any discussion of the questions as presented in the brief for the plaintiff in error. The errors relied upon were there urged separately, and challenged direct answers. But counsel first attempt to shift the ground on which the lower court based its peremptory instruction, and then to sustain the court's action by a claim that the plaintiff and not the defendant was guilty of the breach of the contract.

It will suffice in this reply briefly to indicate these departures, and to bring back the discussion to the issues presented, the questions actually involved in this hearing.

CONCERNING THE FACTS.

The contract sued upon, having been made before the Wisconsin statute was in force, is conceded to be valid. But its performance by plaintiff in error was, it is said, made illegal by that statute. Counsel ignore the essential character of that performance as shown by the proof, and base their argument upon the wording of the contract. They do not deny that the very acts, which they claim were a doing of business in Wisconsin, are shown by the evidence not to have been done—their appeal to the original complaint confesses this—; nor that it was the clear intention of the parties that so far as the operation of the factory was concerned, the defendant should be—as it was in fact—the sole judge of the extent of such services. The contract is that the plaintiff shall have the management and shall operate, and furnish a superintendent (paid by the defendant) "and give such personal supervision as may be necessary from time in the operation of the same." (Pr. Rec., p. 76)). This personal supervision was a specific statement of what was meant, by management and operation; otherwise it has no meaning. This interpretation is confirmed by the conduct of the parties. If the contract gave the defendant the right to demand personal supervision and control of the factory by the plaintiff, it also gave it the right to limit the extent of such supervision and control, or to exclude plaintiff altogether.

In all the correspondence relating to the termination of this contract, defendant never referred to any services due from, or being rendered by, the plaintiff, *except the selling of the product of the factory.* Beginning November 20th, 1899, the United States Glue Company thus referred to the service required of the plaintiff under the contract. (Rec. p. 96):

"We have no such [more advantageous] agreement in view, although, of course if *we are to continue to manufacture*, and our relations with you are terminated, we shall be obliged to make new arrangements, not necessarily new connections, *in order to put goods upon the market.*" * * * "Your agreement is to sell our product."

And on November 28 (Rec. p. 99): "The termination of your *arrangement for handling our product* has been before us both."

And on December 2nd. (Ex. 34, Rec. p. 100): "As we wrote you on the 28th ult., we wished you *to desist from making any further sales* as representing us * * * *as* * * * *the agreement* * * * *is at an end.*"

And when on December 5th, 1899 the plaintiff asked defendant to name the "various breaches" referred to in defendant's letter of the preceding day, the request was ignored, and the only answer was: "our action is, in our judgment, based on good and sufficient legal grounds." (Exh. 35, 36 and 37, Rec. pp. 101–102).

When the contract was thus arbitrarily terminated the plaintiff had neither a single employee nor any property in the State of Wisconsin (Rec. p. 45); it merely ceased to sell the product of the Wisconsin factory from its Chicago office. Hardin was then superintendent at the factory, the paid employee of the defendant, and he so continued. Morehead who was first sent by the plaintiff, was succeeded by Hardin in September, 1899, and thereupon resumed his employment with the Diamond Glue Company, and was its general superintendent at the time of the trial. Neither was at any time an employee of both companies.

In view of these facts counsel's failure to attempt any answer to our argument of waiver is easily understood.

The facts neither created, nor were claimed to create, a new contract, as counsel asserts. They showed conclusively: (1) That the plaintiff was not called upon to do business in Wisconsin in order to perform its contract up to the time of defendant's breach; (2) that the plaintiff was not in fact engaged in business in Wisconsin; and (3) that the plaintiff's failure to do the acts described in the contract, which are claimed to constitute doing business in Wisconsin, cannot be complained of by defendant.

The cases cited by counsel only indicate that the acquisition of property or the maintenance of an agent within a state may be regarded as "doing business" with in that state. As the Diamond Glue Company had no property in Wisconsin, and maintained no agent there, these cases do not apply.

There is a half-hearted attempt to sustain the only breach claimed by the defendant in the correspondence, namely, the plaintiff's failure to sell the entire product of the factory as rapidly as it was produced at the prices fixed by the defendant. The contract specifies no time within which the glue was to be sold. Surely the plaintiff was permitted a reasonable time in view of the condition of the market; yet the defendant repudiated the contract within ninety days after the first glue was ready for shipment. Plaintiff's duty was to use its best efforts to sell this glue. As pointed out in our former brief (p. 11) these efforts were systematic and thorough, and were beginning to bear fruit when the defendant broke the contract. Plaintiff never claimed that it was under no obligation to sell this glue, but it explained again and again—and the explanation is sufficient —why it took time to place the product of a new factory upon the market in the proper way (Rec. p. 45).

There is no warrant in the record for counsel's statements to the contrary, or that the plaintiff claimed the right to use the product of the factory to manipulate sales. (Principal brief for defendant p. 25).

In view of these plain facts counsel's claim that the management and operation of the factory furnished the principal advantage of the contract to the defendant is remarkable, but need not be considered further.

Much is attempted to be made of the fact that the plaintiff was also acting as sales agent, under a similar contract, of the glue factory at Gowanda. The Diamond Glue Co. had no more interest in the Gowanda factory than it had in the United States Glue Company's factory. It was sales agent for both. It was asked to agree to sell only the product of defendant's factory, and it refused so to agree. (Rec. p. 33, 34, 75). Defendant knew that it had not thus agreed, and knew that it had a similar contract with Foerderer in Philadelphia and with Gaensslen-Fisher & Company, at Gowanda, before it made its contract of June 25th, 1898. (Exh. 2, Rec. p. 74). Counsel argue as though exclusive sales agent meant exclusive principal. It was necessary that the factor should control the entire product of the factory to protect it in the very large initial expenses incurred in placing the product on the market.* It was not necessary—it would be absurd—for a sales agent, having an established business as a large glue commission merchant, to restrict itself, as to a certain kind of glue, to the product of one factory, with no allowance for expenses, no control of prices and no guaranteed compensation. The competition between the product of this factory and the Gowanda factory was absolutely controlled by the principals who produced the commodity and fixed its price. Certainly upon this record there is no evidence of the breach of the contract by the plain-

* Defendant's answer even states that these expenses would have amounted to as much as the commissions to be paid. (Rec. p. 15).

tiff which would warrant a peremptory instruction in defendant's favor. (See further our original brief p. 100-102).

II.

Concerning the Questions of Law raised by the Briefs for Defendant in Error.

First. Is a statute, before it is in force, any part of the law of the state?

Second. Does the constitutional prohibition against the impairment of contracts apply only to contracts fully executed?

First. Was the Wisconsin statute, which by its terms did not go into effect until Sept. 1st, 1898, such a law of the State on June 25, 1898, that it entered into and formed a part of the contract made on that day?

To sustain the affirmative, counsel argue at length upon the validity of statutes controlling the coming of foreign corporations into a state, and recite the equally admitted and irrelevant history of the amendment of the act in question.

The original act, *which is the act pleaded*, it is now conceded, was "void as to natural persons residing in other states." (Principal brief p. 8). It is an unsupported assumption that this invalidity as to partnerships and voluntary associations did not infect the entire act. (See our brief, pp. 31-40). The recent case of the *Ashland Lumber Co.*, cited by counsel, (p. 7 of brief), does not touch

the question here. Neither the validity of the statute as originally passed, nor its application to a contract made before the statute was in force, was there considered or raised.

But admitting the validity of the act as an act, the question remains, can it be held to excuse the breach of a contract made before the statute was in force?

Counsel's argument is ingenious (pp. 11 to 17, Brief of Mr. Lines): the legislature passed the act in 1897; it then required the approval of the governor, publication, and a certification thereof by the judges of the Supreme Court; all these things had been done prior to the execution of the contract; therefore, *although the act itself provided that it should not go into force until Sept. 1st, 1898*, on June 25, 1898, it was a law which entered into the contract between the parties and therefore could not impair its obligations. (*Idem.* p. 16).

How could the act be more operative as to this contract than to invalidate it? How fatuous, against the express provision of the statute, the argument that the constitutional prohibition applied, not to the effective law, but to some step or steps in its creation. Counsel's industry has collected many cases in which language is used which he takes as indicating the approval of this doctrine; but in not one case was this question involved.

If this statute had life for any purpose after publication but prior to Sept. 1, 1898, it had precisely similar prenatal existence *before* publication but after its passage. Throughout both stages equally it was only a *foetal statute—in posse*—not a law. It might never become effective; no one could know until Sept. 1, 1898. Counsel's argument makes the law speak, *first*, from its passage; *second*, from its publication; and *third*, from its "going into force."

A law may be complete and finished upon its passage; but if it does not go into force until a specified day it cannot become a part of the law of the state until that day. The "notice" which counsel claims the act gives during the interim does not limit the freedom of contract which otherwise exists; at most it has been held to bear upon *the reasonableness of a change of remedy* as affecting the validity of the statute, and not upon the *existence of the change prior to the appointed date.*

The case of *Stine vs. Bennett*, 13 Minn., 138, 143, concerns the validity of a statute of limitations whose operation was postponed, as the court held, for the purpose of enabling suitors to bring their actions before it went into effect. However good that reasoning may be with regard to statutes of limitation, it has no application to ordinary statutes, where the rule is well settled that they speak from the time of their going into effect and not from the time of their passage. Thus in the case of *Commonwealth vs. Bennett*, 108 Mass., 30, 32, also cited by counsel, the Court said: (page 32)
"*A statute speaks from the time when it takes effect*, and a penalty "*already incurred*" is one incurred *at any time before the statute takes effect.*"

And even in regard to the statute of limitations the rule in *Stine vs Bennett* is by no means established. See Price vs Hopkins, 13 Mich., 318, where COOLEY, J., in a very forcible and well considered opinion, held directly the contrary. The other cases cited by counsel are not in point.

Counsel's argument makes this statute control this contract as completely as though the contract had been made after the statute was in force. Therefore it abolishes the difference, which the statute itself *creates and expresses*,

between being operative and not operative. The language quoted by counsel was used in cases in which the question raised here was not in view. They are wholly inapt. (See our brief, pp. 50-62).

Not only the weight of reason and authority pronounces a law no law *until it is in force*, but this was expressly held the law of Wisconsin in *State vs Messmore*, 14 Wis., 163 175, cited in our former brief at page 56; while counsel are forced to the conclusion (Mr. Lines' brief, p. 17) that a legislative act between the time of its passage and the time prescribed for going into effect has as full effectiveness against contracts made during that period as it has against contracts made after the act is "in force." It is not the making of the contract which renders a prior enactment invalid, but the action of a court, which, by giving such statute a retro-active effect, makes a new contract for the parties, or deprives one of them of the benefits which the contract gave when it was lawfully made.

This precise question was decided in an able opinion by the Supreme Court of Michigan in *Cargill vs. Power*, 1 Mich., 369, 370-2. The Michigan legislature passed an act in 1846 reducing the time of redemption from a mortgage sale from two years to one year. The act was part of the revised statutes which by their terms went into effect March 1st, 1847. In January 1847 the mortgage in question was executed, and a sale to foreclose it was made in July 1848. The question before the court was whether the period for redemption was two years or one year. The Court said (page 370):

"It is insisted that, as the mortgage was executed after the passage of the revised statutes but before they took effect, that the intention of the parties was that the proceeding under the power to sell should be regulated

and their rights governed by the provisions of the revised statutes.

"No statute has, *ex proprio vigore*, any force until it becomes the law of the land. All persons are bound to know what the law is; and as it is that which is to govern the actions and conduct of men, their contracts, it is to be presumed, are made in reference to it unless the contrary is shown.

* * * * * *

"With what propriety, then, can we say that the legal presumption is that their contract, in its very terms made in reference to the law, *was not made in reference to the law in force, but in reference to one which might never take effect?*"

The Court then held that under the law in force when the mortgage was made the mortgagor had the right to retain possession of the premisis for two years after the sale; and they say further concerning the impairment of contract obligations: (p. 372)

"The object of the constitutional provision, it was said in *Bronson vs. Kinzie*, 1 How. 311, was to maintain the integrity of contracts, and to secure their faithful execution throughout the Union,. The tendency and effect of the legislative provisions we have been considering are, to impair the integrity of this mortgage contract, and impose upon it an execution contrary to its meaning and the intention of the parties; and in my opinion we are in duty bound to pronounce them, so far forth, to be unconstitutional."

Second. CAN ANY EXECUTORY CONTRACT BE IMPAIRED BY A STATUTE ENACTED AFTER THE CONTRACT WAS MADE?

Counsel answer the question thus:

"Every executory contract of a corporation to transact business in a foreign state is conditioned as a matter of law upon the continuation of license from that state to come within its borders." (*Principal brief for defendant in error, p.* 11).

In other words, the constitutional protection belongs only to *executed* contracts. But no contract can ever in any controversy unless it is executory as to one party. And it is for the very purpose of compelling execution that the constitution prohibits a state from excusing performance,—from impairing the obligation through the enforcement of which alone a contract is ever *executed*.

This contract would have been as essentially executory in September, 1900, as it was on September 1st, 1898. The contract was an entirety. Its obligations could no more be lawfully changed by statute during the first year of its life than during the last. So far as the location, construction and equipment of the factory were concerned it *was executed*. And it is a significant fact in this connection that so far as it had been executed it was for the sole benefit of the defendant, and that the executory part alone was of advantage to the plaintiff. How idle to say that this statute, even if retroactive, did not impair the obligation of this contract. (Idem p. 16). Where, for the plaintiff, is "*juris vinculum*" when its contract becomes unenforceable for its benefit? This statute does not impair the obligation of the contract?—when the statute itself is defendant's excuse for non-performance of the contract—confessedly valid when made? When it is claimed the obligation is gone—the chain is broken—for want of an act not required of the plaintiff when the contract was made?

When counsel come to discuss the plaintiff's right to recover damages they forget this executory argument, and say (*Idem* p .26): "The contract is an entirety. The stipulation for planning and supervising the construction of a factory *are preliminary only and call for no compensation.* No compensation is considered except as it is to be derived from the last step—*sales of product*—and is measured by commissions thereon." And as to commissions already earned it is claimed there could be no recovery, because such claim would be for "compensation for an *executed* portion of a contract forbidden by law.*** "This part, if it alone were illegal, would so infect the whole contract and the right of recovery as to avoid the whole." (*Id.*, p 26). Forgetting that on a prior page they had argued that the inclusion of natural persons in this statute did *not* "avoid the whole."

The foreign corporation is not an outlaw. Its contracts are just as sacred as the contract of a natural person or of a domestic corporation. It is true that a state may admit corporations of other states to do business within its borders, or not, as it chooses; but it cannot admit them to do business there, to make contracts there, and then destroy the binding force of those contracts, or by imposing conditions or otherwise, deprive the foreign corporation of any part of their benefits. Because a corporation organized in Illinois has been making and performing a contract in Wisconsin, it has no right, against the will of Wisconsin, to go on making new contracts there; but it has the right, and it is its duty, to carry out those already made before its status was changed.

If the highest authority is needed to strengthen a position so clear upon principle, it is found in *Bedford vs. Eastern Building & Loan Association*, 181 U. S., 227, 240, 241.

The Loan Association was a corporation of New York, and through its regular agent in Tennessee issued its certificate of stock to Bedford, a resident of Tennessee, on February 2nd, 1891. This stock made Bedford a member, and entitled to all the benefits of members under the by-laws of the Association. One of these benefits was the right, upon certain terms and condtitions, to borrow money from the Association. On March 20th, 1891, Bedford applied for a preference in obtaining a loan upon real estate which he described. On March 26th, 1891, a law of Tennessee went into effect prohibiting foreign corporations from doing business in the state until they had filed certain papers in the office of the Secretary of State; and another act, effective on the same date, prohibited building and loan associations from doing business in the state until they had deposited certain securities in trust for the benefit of their members and creditors. On May 18th, Bedford's application for preference was allowed; and on June 20th, 1891, he applied for the loan. This application was accompanied by a mortgage duly executed, acknowledged and recorded, together with notes which it secured. On August 11, 1893, the loan association filed the papers required by the general act, but did not comply with the above building association laws in any respect. Bedford defaulted on his notes, and bill was filed to foreclose the mortgage. Bedford answered that the notes and mortgage were in violation of the above laws of Tennessee, and therefore were void. In a similar case the Supreme Court of Tennessee, in 1897, had decided that notes and mortgages executed under such circumstances were void.

This Court held, (on a certificate of Importance from the Court of Appeals for the Sixth Circuit), that the Statutes of Tennessee could not affect the right of the Loan Association to perform the contract, embodied in its certificate

of stock, which it had issued prior to the passage of the law, even though *the contract sought to be enforced was the contract evidenced by the notes and mortgage, which were executed after the laws in question were in full force and effect.* The Court said, at page 240:

"The Statutes of Tennessee, relied on as a defense, were passed March 26th, 1891, and the question is, did the subscription to the stock of the Association, its issuance and the application for a loan in pursuance of it, constitute a contract which was inviolable by the State legislature? We think the answer should be in the affirmative. By his subscription to the stock of the Association, Bedford became a member of the Association—bound to the performance of what its by-laws and charter required of him, and entitled *to exact the performance of what the by-laws and charter required of the Association.* Each acquired a right to what the other promised, and there were all the elements of a contract. We are compelled, therefore, to disagree with the views expressed by the Supreme Court of Tennessee in *New York, &c., Loan Association vs. Cannon*, 99 Tenn., 344."

And at page 241:

"It (the Loan Association) might indeed have the right to decline any condition and retire from the state, and from all it had the option to retire from. *But it could not retire from the execution of its contracts.* It contracted with Bedford to make him a loan if it had the means in its treasury and his security was good. *The state could not affect that obligation nor impair it.* 'The obligation of a contract is the law which binds the parties to perform their agreement.' (4 Wall., 452)."

Here is final answer to counsel's argument that "a State cannot be denuded of its sovereignty" by an execu-

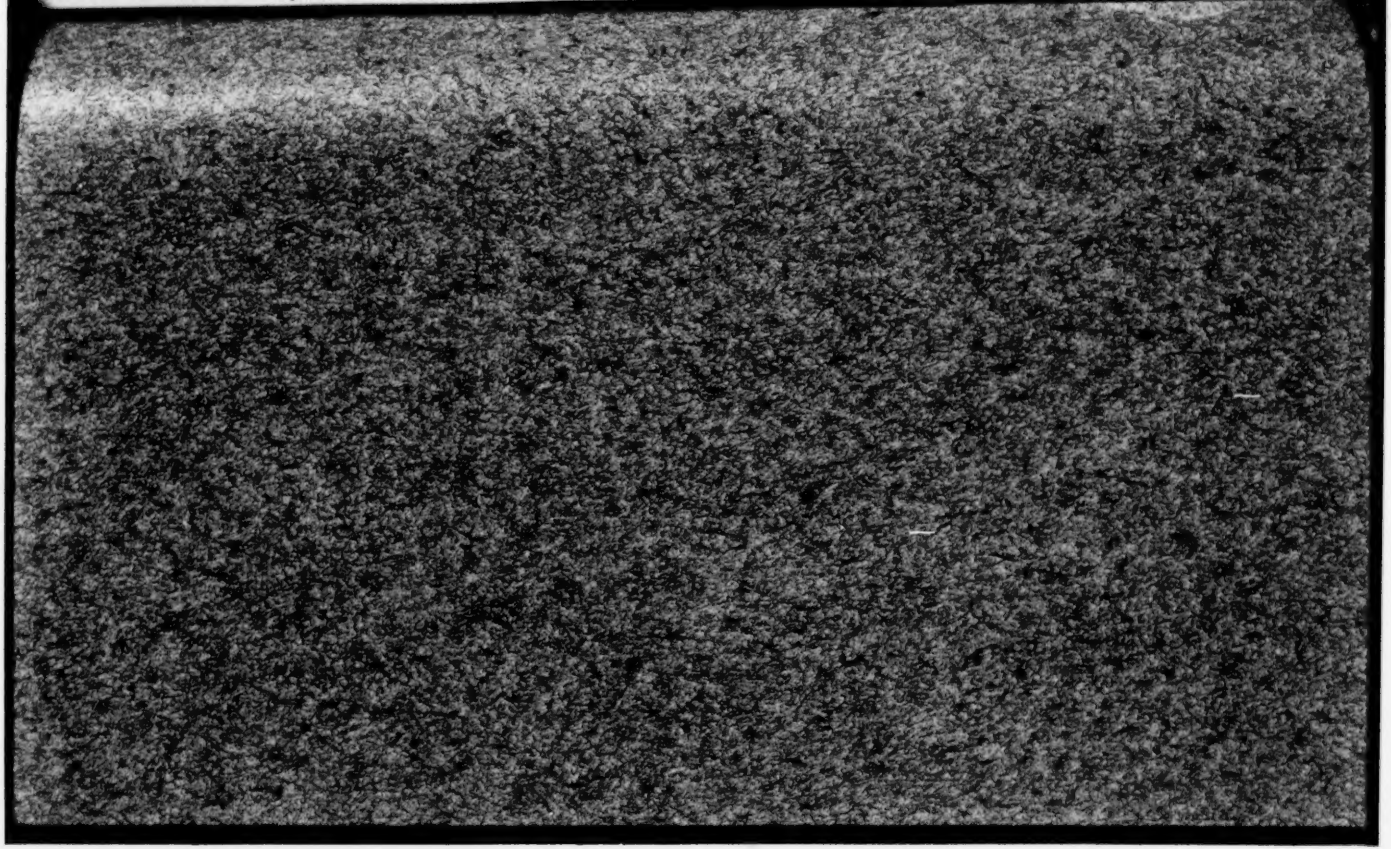
tory contract. The Loan Association might make loans to Bedford (and afterward collect them) as long as he was entitled to them under its certificate of stock valid when issued.

Other questions are discussed by counsel, but they are of minor importance and are considered in our original brief. We respectfully submit that for the errors there indicated the judgment of the Circuit Court should be reversed and the cause remanded for a new trial.

EDGAR A. BANCROFT,
SAMUEL ADAMS,
Of Counsel for Plaintiff in Error.

Supreme Court of the United States.

PETITION OF PLAINTIFF IN ERROR FOR REHEARING.



IN THE

Supreme Court of the United States.

OCTOBER TERM, A. D. 1902.

DIAMOND GLUE COMPANY, *Plaintiff in Error,* vs. **THE UNITED STATES GLUE COMPANY,** *Defendant in Error.*	In Error to the Circuit Court of the United States for the Eastern District of Wisconsin

PETITION OF PLAINTIFF IN ERROR FOR REHEARING.

The plaintiff in error, the Diamond Glue Company, respectfully asks for a rehearing of the questions involved in this case.

The case was argued orally and submitted for decision on the 17th day of December, 1902, just before the holidays. The opinion was handed down January 5, 1903, less than three weeks after the argument. We feel that the contentions of the plaintiff in error did not receive the attention they deserved from the court and were in part overlooked and in part misapprehended. In consequence, the court rendered an opinion which we believe denies plaintiff in error its constitutional rights; sets up a precedent which this court will find itself unable to follow and must necessarily over-

rule at some future time; and, contrary to a decision of the Wisconsin Supreme Court, gives a construction to a Wisconsin law which the legislature never intended.

The suit was brought by an Illinois corporation to recover damages for an anticipatory breach by a Wisconsin corporation of the terms of a contract providing that the Illinois corporation should act as selling agent for the Wisconsin corporation. The defense was that other provisions of the contract required the Illinois corporation to do business in Wisconsin—not in selling goods, but in connection with their manufacture—and that the Illinois corporation had not complied with the terms of the foreign corporation statute of Wisconsin enacted before, but going into force some time after the contract between the two corporations was made. The case was tried before Judge Seaman and a jury, and at the close of plaintiff's evidence a peremptory instruction was given for the defendant. Plaintiff's evidence tended to show that it had carried out all the provisions of the contract to be by it performed, *except in so far as they had been waived by the defendant*, and that the plaintiff had not since September 1, 1898, the day when the statute went into force, done any business in Wisconsin contrary to the terms of the statute.

The Mistake of this Court in Applying the Statute to the Facts of the Case.

There are only two provisions of the Wisconsin statute which can, under any circumstances, affect contracts made by foreign corporations or their performance. The first is the provision that no corporation "shall transact any business, or acquire, hold or dispose of property" in Wisconsin

before compliance with the statute. The second is the provision that every contract made by a foreign corporation "affecting the personal liability thereof, or referring to property within this state" before compliance with the statute "shall be held void on its behalf." (See Wisconsin Statute, pp. 18-20, our original brief.) The first provision has reference solely to acts *done in Wisconsin after September* 1, 1898, and in consequence can only be infringed by acts done *after that date*. In regard to it the *terms* of the contract are entirely immaterial. In regard to the second provision, the terms of the contract would be allimportant, were it not that, as is admitted, no contract made before September 1, 1898, could infringe that provision.

Yet the court dwells upon and sets out the *terms* of the contract between the United States Glue Company and the Diamond Glue Company made before September 1, 1898, as if they had some bearing upon the question whether there was a breach of the provisions of the statute forbidding the *transaction of business* after that date. The opinion does not point out any business transacted by the Diamond Glue Company in Wisconsin contrary to the terms of the statute, nor does it state that the Diamond Glue Company did so transact business; in other words, it does not show a single violation of the statute. The contract itself being made before the statute was in effect did not violate it. It does not appear that in performance of the contract there was any violation of the statute. How, then, can the statute be a defense to a suit on the contract?

It might be answered that the Diamond Glue Company was bound by the contract to perform acts against the statute, unless it first complied with the statute, but certainly the court cannot assume that the Diamond Glue Company

would not have complied with the statute before performing those acts, especially as the court insists that the compliance with the statute is easy and formal. Moreover, among the numerous defenses set forth in the answer of the United States Glue Company there can be found no complaint that the Diamond Glue Company failed in carrying out that part of the contract which, as the court has interpreted it, required it to do business in Wisconsin. If the contract is to be held broken by such non-performance on the part of the Diamond Glue Company, it should have been pleaded. That it was not pleaded certainly shows that the United States Glue Company did not complain of such inaction. (See defendant's answer, Rec., 7-15.)

Had the United States Glue Company written to the Diamond Glue Company before September 1, 1898, to the effect that on account of the statute it would not expect the Diamond Glue Company, in performance of the contract, to transact any business in Wisconsin, and would waive the performance of such acts in so far as they were required by the contract until further notice, we do not think the court would hold that the statute was a defense to the present action, yet the opinion is entirely consistent with such a supposition; it must therefore be unsound.

While, in fact, the United States Glue Company did not so write to the Diamond Glue Company, the position taken by it accomplished the same result. The building of the factory was done by the United States Glue Company, and when the factory was erected, not only did the United States Glue Company not expect the Diamond Glue Company to take charge of it, or even to take charge of the handling of the products of the factory, but it immediately took charge of all the operation of the factory itself and regarded the

Diamond Glue Company simply as an advisor. (See our original brief, pp. 6-7, 96; Rec., 57, 59, 62, 89.) In other words, whether the acts of the United States Glue Company be regarded as an interpretation of the contract, or as a waiver of some of its provisions, it cannot be denied that the Diamond Glue Company was not called upon or expected to manage the factory or control the products and that it did not do so.

Yet the opinion commits the logical fallacy of regarding the Wisconsin statute as violated by the terms of a *contract* made *before* the statute was in force. The opinion says:

> "It did assist in operating by its officers and did supply a superintendent, and *whether in his superintendence he in fact acted as agent for the plaintiff or defendant, what the contract required is plain.*"

The sentence quoted not only contains the error in reasoning above pointed out, but does an absolute injustice to the plaintiff in its implied assumptions. It assumes that any assistance rendered by the officers of the Diamond Glue Company, even by advice as to running of the factory, would be a transaction of business in Wisconsin. Is the court willing to commit itself so far? Think of the result! No officer of a foreign corporation could give advice as to the running of a plant or the doing of any business by a domestic corporation without rendering his own corporation liable to fine! In the above quotation there is a further injustice done. The court implies that perhaps the superintendent of the factory was acting as the Diamond Glue Company's agent. The testimony was all the other way; *it must be remembered that the case comes up after an instruction in defendant's favor at the close of the plaintiff's testimony, therefore, it is not the province of this court, nor was it of the Circuit*

Court, to weigh the testimony. It was the duty of both courts to believe the testimony given, except in so far as it was either impossible or contradicted itself.

The gist of the opinion heretofore filed, so far as it concerns the applicability of the statute to the performance of the contract, is contained in these words:

> "It hardly could be contended that the contract was illegal, on the ground just stated, when it was made. If indeed it had contemplated the plaintiff's going on without complying with the statute it would have raised a question which we need not discuss. But it must be taken to have contemplated legal action, and if filing a copy of its charter was a condition precedent of the plaintiff's right to carry out its undertakings, then a promise might be implied on its part to take the necessary steps. But if, *when the time came*, the plaintiff did not take those steps, the defendant had the legal right to refuse to go on, whether its right be put on the ground of the plaintiff's breach of its implied undertaking or of the illegality of the proposed continuance of the work."

This might all be admitted and yet it would not affect the case for the reason that *the time never came*. The time referred to must be the time when the plaintiff was called upon to do business in Wisconsin. Before that time it cannot be pretended that the Diamond Glue Company was under any obligations to register as a foreign corporation seeking to do business in Wisconsin. What were the acts which the contract required, according to the court's own interpretation, the plaintiff should do in Wisconsin? Obviously to manage the factory, etc. Therefore the plaintiff was not required to register in Wisconsin as a foreign corporation until it was its duty to manage the factory. This duty the court would say arose when the factory was ready to go into operation, or perhaps when it was built, but it is just there that the rea-

soning of the opinion fails on account of its *misapprehension* of the facts. The duty of the plaintiff under the contract was a duty running to the defendant. If the defendant chose to dispense with or postpone the performance of that duty the plaintiff was not bound to perform it. Whether the defendant did so dispense with or postpone performance was at least a question of fact for the jury. Yet the opinion says that because the letter of the contract required the plaintiff, unless properly registered, to break the law, therefore the plaintiff did break the law. The opinion gives contracts a force and sacredness hereto unknown, in that it makes them efficient to compel the parties to do acts which both of them are willing to leave undone. We had supposed that a valid contract between two parties was for the benefit of one or the other, or both, but it now seems that a contract exists for its own benefit and, against the will of both parties to it, can drive one of them into an infraction of a penal statute.

The opinion says, concerning the contract and its performance:

> "The plaintiff was to have the management of the manufacturing, was to operate the factory, or at least to assist in operating it, and to keep it supplied with a superintendent. It did assist in operating by its officers and did supply a superintendent, and whether in his superintendence he in fact acted as agent for the plaintiff or the defendant, what the contract required is plain."

In other words, the court expressly says that the test of the illegality of plaintiff's acts is not *what the plaintiff did*, but *what the contract*, as made, not as performed, *required*.

The words quoted might seem to point out ways in which the plaintiff had actually done business in Wisconsin contrary to the statute, but in fact no such business was done.

The assistance shown by the record was not the maintenance in Wisconsin of people who actually helped in doing the work of operating the factory. It was simply the giving advice by the Diamond Glue Company as to the best methods of performing the various operations of the factory. Sometimes the advice was given by an officer or employe of the Diamond Glue Company, who went up to Wisconsin to look over the factory. (Rec., 54, 57.) Often it was by letters from Chicago. (Rec., 81, 83.) Furnishing a superintendent was simply sending a man across the state line, who, on arriving in Milwaukee, or at the factory, entered into the employ of the defendant. None of these acts taken singly, nor all of them together, show so conclusively as to authorize taking the questions from the jury—nor indeed can be held to have the slightest tendency to show—that the Diamond Glue Company was "doing business" in Wisconsin. See *Kilgore* v. *Smith*, 122 Pa. St., 48, 54. They were such acts as any selling agent might do. No commands were given in Wisconsin by officers or agents of the Diamond Glue Company. The Diamond Glue Company did not keep in Wisconsin a single employe or officer; it did not have a dollar there invested. Rec., 42, 45, 46, 57.) If the acts mentioned constitute a "doing business" in violation of the statute, then it would be unsafe for any foreign corporation contemplating doing business in Wisconsin to send an officer or agent there to look over the ground.

"Doing business" by a foreign corporation in this connection is held to mean doing the ordinary business of the corporation. See:

Sullivan v. *Lumber Co.*, 103 Ala., 371, 380.
Beard v. *U. & A. Publishing Co.*, 71 Ala., 60, 62.

Morgan & Co. v. *White*, 101 Ind., 413.

Utley v. *Clark-Gardner Mining Co.*, 4 Col., 369, 375.

Thompson on Corporations, Vol. 6, Par. 79, 36.

It cannot be imagined that the giving of advice or the furnishing of a superintendent, or both together, would have been regarded by the Wisconsin courts as subjecting the Diamond Glue Company to a fine of $500. Yet, if the Diamond Glue Company is not subject to fine, it has not broken the statute.

That the statute contemplated not the casual giving of advice or suggestions but the actual management of enterprises or at least the making of contracts is evident from its language:

> "No corporation * * * shall transact any business, or acquire, hold or dispose of property in this state until such * * * corporation shall have caused to be filed in the office of the secretary of state a duly authenticated copy of its charter * * * and all amendments thereto which may be made while it shall continue to do business therein."

The decision of the court amounts to this: The defendant and plaintiff made a contract—valid when made—containing a number of superfluous provisions as to the management of defendant's factory by the plaintiff, which were inserted for no one knows what reason, and were ignored absolutely by both parties, in their subsequent dealings. The performance of these ignored clauses, except on conditions not fulfilled, afterward became illegal; therefore, the defendant is released from its contract, even though there has been no attempt to perform the ignored clauses nor any desire on the part of the defendant that they should be performed. This

reasoning certainly cannot be supported. The result reached by the court not only fails to follow necessarily from the facts—it has no relation to them.

Interstate Commerce.

The error of the court in confusing the terms of the contract made before the statute went into effect with possible violations of the statute after it went into effect is strikingly obvious in the treatment given our contention that the matter concerning which suit was brought was interstate commerce. We quote from the opinion:

> "The foundation of the commerce outside the state was doing business within it. The superintendence and manufacture had to come before the sale. The small requirements of this act before allowing the plaintiff to do business within the state, if good as to that business taken by itself, are not made bad by the presence in the contract of an ulterior term which the plaintiff might or did intend to carry out by transporting the products of the business elsewhere."

The facts are these: The breach of the contract for which suit was brought was refusal to allow the Diamond Glue Company to go on with interstate commerce; that is, to sell the products of the factory from its offices in Chicago and elsewhere outside the State of Wisconsin. It is said that in the performance of other parts of the contract the Diamond Glue Company was breaking the law of Wisconsin. The testimony shows that the Diamond Glue Company was not breaking the law of Wisconsin, although it had previous to the going into effect of the law made a contract, in performance of which it might have broken the Wisconsin law, according to the interpretation of that law by the opinion. How can the *terms of that contract* be a defense to an action brought for refusal to allow

the Diamond Glue Company to do interstate commerce? And yet it is the terms of the contract and not the acts done under it which the court discusses in this connection. No control of the factory by the Diamond Glue Company is mentioned anywhere in the opinion; not an instance is pointed out where the Diamond Glue Company was doing business in Wisconsin, and yet, because the terms of the contract, validly drawn, provide that it should do business there, the court regards those terms as equivalent to its actually doing business, even when the actual doing of business not only did not exist, but was not desired by the other party to the contract.

We are unable to understand the reasoning which lead the court to hold that the interstate commerce carried on under this contract was not protected by the United States Constitution. The court says:

> "It is said that the contract in suit, as carried out, was concerned in part with interstate commerce, and therefore was free from the operation of the Wisconsin statute. The portion of the contract that called for the carrying on of business in Wisconsin was not so concerned, and the inseparable provisions as to selling left it to chance or extrinsic business considerations whether the contemplated traffic should go outside the state or not."

It is to be observed that the opinion assumes that it was by chance only that the selling of the product of this glue factory became interstate commerce. We cannot see that that makes any difference. We do not understand that the protection afforded interstate commerce by the United States Constitution depends upon the length of time which it takes to plan that commerce, or whether it is chance or other considerations that lead to its being interstate commerce.

The evidence all shows that at the time of the making of

the contract the Diamond Glue Company was selling glue entirely from its home office and branch offices outside the State of Wisconsin, and therefore it was not a subsequently arising chance, but a probability understood by the parties that the glue should be so sold. The main object of the contract, certainly the only object so far as the Diamond Glue Company was concerned, was the selling of the glue and grease to be manufactured. It was contemplated that this selling should be interstate commerce. The evidence shows that the glue and grease sold entered into interstate commerce.

But the court says it was by chance. According to the same reasoning it would be by chance and a chance beyond the control of the Diamond Glue Company that the factory was located in Wisconsin, for the contract itself only provides on that subject that the site was to be selected by the United States Glue Company. (Rec., 76.) Yet the opinion says: "It was understood that the proposed factory was to be in Wisconsin," and proceeds to treat the contract as if it required the factory to be in Wisconsin and therefore, that the contract required the Diamond Glue Company to comply with the Wisconsin law. May we not justly insist that if the understanding, which the court finds existed, that the factory should be in Wisconsin, be incorporated into the contract, the further understanding, which stands out even more clearly from the evidence, that the product should be sold from the offices of the Diamond Glue Company *already established,* and therefore that interstate commerce was contemplated, should be read into the contract. There is a homely phrase that "what is sauce for the goose is sauce for the gander."

But why is it necessary to read into the contract any pro-

vision that does not appear in its wording? Suppose the United States Glue Company, which had the sole power of selecting the factory, had chosen to locate it in Illinois, say at Waukegan; would the Diamond Glue Company not have then been bound to perform its share of the contract just as much as if the factory were located in Wisconsin? If this is so, then it was surely no condition of the contract that the Diamond Glue Company should comply with the Wisconsin law, and therefore, its not so complying with the Wisconsin law was no breach of any condition of the contract. The United States Glue Company could hardly be given the capacity to add conditions to the contract by acts done after the contract was made.

Thus, by reasoning suggested by the opinion itself, it is obvious that that part of the opinion which regards compliance with the Wisconsin law as an implied condition of the existence of the contract is without logical foundation. The court in defense of its opinion is then thrown back upon the proposition advanced by counsel for the United States Glue Company that the acts of the Diamond Glue Company were such as compelled the United States Glue Company, in carrying out the contract, to join with the Diamond Glue Company in a breach of the Wisconsin statute. This certainly is far fetched! In the first place, the United States Glue Company had the right to do business in Wisconsin and therefore anything it did in Wisconsin was not a breach of the statute. In the second place, even had the contract been made subsequent to September 1, 1898, by express provisions of the contract, the United States Glue Company could have held the Diamond Glue Company to performance, though not *vice versa*. In the third place, there is the perfectly conclusive answer that, as the Diamond Glue Company was not at the

time of the breach of the contract, or before then, engaged in business in Wisconsin, as it owned no property there and employed no agents there, it was not violating the statute, and therefore the United States Glue Company could not be joining the Diamond Glue Company in violations.

Any Right the Defendant May be Supposed to Have Had to Repudiate the Contract was Waived.

In order to allow the defendant to repudiate this contract on account of the provisions of the statute it is necessary both that the law should be in force and that the Diamond Glue Company should be breaking its provisions. If either of these conditions was lacking the statute cannot furnish a defense to the United States Glue Company. The record shows beyond question that at the time the United States Glue Company refused to be further bound by the contract, and for some time before that, during which period it had recognized the contract as binding and acted under it, the Diamond Glue Company was doing nothing whatever in Wisconsin. It had no agent there—it had no property there. The superintendent whom it had sent there was then not in its employ, but in the employ of the United States Glue Company and upon the termination of its contract remained with the latter. (Rec., 42, 45, 47.) This termination in no way affected the Diamond Glue Company except that thereafter it could not sell from Chicago the glue manufactured by the United States Glue Company. In other words, at the time of the breach of the contract by the defendant, and for some time previous, the plaintiff was doing nothing in any way obnoxious to the Wisconsin statute. Suppose, however, as is intimated by the court, the furnishing of a superintendent four months

before the breach of the contract was in violation of the statute, even though it was interstate commerce. That act of the plaintiff if it gave the defendant an excuse to repudiate the contract, certainly did not give it the choice of carrying on the contract as long as it wanted and then repudiating it. Whether a violation of the statute is looked upon as a breach of the implied conditions of the contract or not, it is obvious that the defendant if it desired to take advantage of it must have taken advantage of it immediately; it could not experiment with the plaintiff to see how it was coming out and carry matters along until it owed the plaintiff some thousands of dollars for commissions actually earned and then turn back to this old so-called breach and says, "Because you once did an illegal act, though you are now doing nothing against the law, we cannot further carry out our contract with you.

If the defendant ever had a right to repudiate that, right must have been exercised before the plaintiff is put in worse position, or else it *was waived.*

We presented this point somewhat at length in our original brief in this case, yet it was not noticed in the court's opinion. (See brief, pp. 91-98.) To our minds this shows that our case did not receive the attention which it merited from this court. The contention must have been overlooked. It could not otherwise have been passed over in silence.

The Circuit Court Invaded the Province of the Jury in giving a Peremptory Instruction in the Case.

It is well established law that a trial judge should not give a peremptory instruction to the jury to find for the defendant where there is any evidence, even though contradicted, which fairly tends to support the allegations of fact

necessary to plaintiff's case. Nevertheless, Judge Seaman decided for himself, without submission to the jury, in the face of all the evidence, that plaintiff was violating the statute at the time of the breach of the contract.

We realized that this assertion may seem incredible, but it is nevertheless true, and it is a matter which, while we pointed it out in our brief, has been entirely overlooked by this court. *There is not a scintilla of evidence to show that the Diamond Glue Company had at or about the time of the breach, or indeed at any time, done acts in Wisconsin which would subject it to fine under the provisions of the Wisconsin statute.* Yet the opinion filed, affirming the judgment of the Circuit Court, convicts the Diamond Glue Company, in effect, of a penal offense against a law of Wisconsin when the record shows no offense against such law, except, forsooth, in acts done before the law was in force.

The opinion goes on the entirely untenable theory that the contract made before September 1, 1898, gave color to acts done after that date, so as to turn the doings of an employe of the United States Glue Company into transactions by the Diamond Glue Company. The facts make it clear beyond doubt that the plaintiff did not manage defendant's factory, therefore it could not have violated the Wisconsin statute in that respect. The plaintiff is defeated because this statute forbade plaintiff to do, not what it did, but what it did not!

Is this court willing by its opinion to support the remarkable proposition that a penal statute can be broken by a contract made before the statute is in force? It must be clear that neither a man nor a corporation can violate a statute except by acts done subsequent to the going into force of the statute and within its territorial jurisdiction.

In a criminal case there would be no need even to state such a proposition. Yet in this case this court and the Circuit Court have ignored it completely and have regarded a valid contract made before the statute was in force as conclusive evidence that the plaintiff has violated the statute.

Had there been no contract between the parties, no one would be found rash enough to assert that the Diamond Glue Company had in anything done by it, as shown in the record, rendered itself liable to fine under this statute. How then can the existence of the contract previously made change the situation?

But it is said there is a contract and the suit is brought on this contract. This is true, *but the defense considered is not one of non-performance of the contract, but of breach of the statute, and if the statute is not broken by acts of the plaintiff the defense must fall.*

All these considerations have a special bearing on the claim of the Diamond Glue Company for commissions already earned, amounting, as pointed out in our former briefs, to the sum of over three thousand dollars. Our claim for these commissions already earned was not apparently considered by the court at all. The only thing said in the opinion that could apply to this part of our case is the following:

> "But the contract was an entire contract, as both parties agree, and therefore whatever the defendant had in mind, if it was justified by the law, in refusing to perform a material part, it was justified in refusing to perform any portion."

It will be noted that this claim is not for damages on account of the defendant's refusing to perform in the ordinary sense, but for commissions earned on business transactions which the plaintiff had already performed so far as

performance was required by it. Therefore, the whole reasoning of the opinion has no application to this claim. Whether or not the unexecuted parts of the contract were rightly put an end to by the defendant, as the court says, still the defendant could hardly absolve itself from paying the plaintiff an indebtedness already accrued under the executed part of the contract. *The contract was valid*, therefore, whether its further performance had become invalid or not, all executed claims arising under it were enforcible at law.

The idea that the contract was an entirety does not affect this. The contract was an entirety on any hypothesis only in so far as neither party had a right without the concurrence of the other to break any part of it and insist on performance of the rest, but it was not an entirety in so far as the payment of the Diamond Glue Company was concerned. The Diamond Glue Company was to receive a commission of ten per cent. *upon sales as made*. That this was understood by the defendant is shown by the fact that the commissions were in part paid. In this respect the contract was similar to one by which a servant is hired for a year to be paid monthly. He has a right to receive payment for the months already completed even though he may be rightfully discharged before the year is out. And, as we must again call to the court's attention, the utmost, on the court's own reasoning, that was shown in this case was the right by the United States Glue Company to discharge the Diamond Glue Company. There was no right to declare the contract void *ab initio*.

The Opinion Overrules Bedford v. Eastern B. & L. Association, 181 U. S., 227.

The opinion of the court in this case seems directly contrary to *Bedford* v. *Eastern B. & L. Ass'n.*, 181 U. S., 227. The opinion clearly implies that even if the Wisconsin law had been enacted after the making of the contract, still it would have afforded a defense to a suit brought for its breach. In the Bedford case it was distinctly held that where a statute is passed imposing conditions upon the further doing of business in a state by a foreign corporation, the foreign corporation must, whether it complies with the law or not, carry out its contracts already made. The court in that case says (p. 241):

> "It might indeed have the right to decline any condition and retire from the state, and from all it had the option to retire from. *But it could not retire from the execution of its contracts.* It contracted with Bedford to make him a loan if it had the means in its treasury and his security was good. The state could not affect that obligation nor impair it. 'The obligation of a contract is the law which binds the parties to perform their agreement.'"

And again:

> "We recognize the power of the state to impose conditions upon foreign corporations doing business in the state. We have affirmed the existence of that power many times, *but manifestly it cannot be exercised to discharge the citizens of the state from their contract obligations.*"

This case is absolutely in line with *Security Savings & Loan Ass'n.* v. *Elbert*, 153 Ind., 198, which is brushed aside in the opinion, and certainly is absolutely irreconcilable with the reason given by the court for its decision in this case. This opinion if allowed to stand must be regarded by

other courts, and by the profession at large, as directly overruling the Bedford case.

The Court has entirely Misapprehended our Argument as to the Unconstitutionality of the Statute as Applied to Section 2, Article 4 of the United States Constitution.

The last paragraph of the opinion deals with our contention that the statute was unconstitutional as infringing the provisions of the United States Constitution that guarantees to citizens of each state the privileges and immunities of citizens of the several states. It may be remarked that the opinion refers to this as "Article 2, Section 4," instead of Section 2, Article 4. The court assumes that our argument is based merely upon the application of the statute as originally enacted to partnerships, and answers that the act of the legislature changing the statute in striking out the word "partnerships" by an amendment enacted after the parties had entered upon performance of the contract showed that the provisions as to corporations in the original statute were distinct from those of partnerships and therefore that the former could stand even though the latter were unconstitutional. (See our original brief, pp. 19, 20.)

But we did not found our argument merely upon the inclusion of "partnership" within the restriction of the statute, but upon the express inclusion also of common law joint stock companies and voluntary associations formed in other states. The amendatory act left still effective the restriction of these by the statute. If the act was unconstitutional as to partnerships—and the court does not deny it—it is unconstitutional as to common law joint stock companies and as to voluntary associations of all natures operating

without a charter. If, as the court says, the amendment of the legislature in striking out partnerships showed that it was its intention two years before to treat partnerships and corporations severally, the amendatory act in leaving in joint stock companies and voluntary associations showed just as plainly that it was the intention of the legislature to treat foreign corporations as in the same class, and that even after its attention was called to the unconstitutionality of its enactment in regard to unincorporated bodies it was ready to leave the rule in regard to corporations and that in regard to voluntary associations and joint stock companies to stand or fall together.

The court states no reasons and cites no authorities as to why it regarded the provision as to corporations as being separable from the other provisions of the statute. A single purpose is evident in the statute, both as originally enacted and as amended, and that is the treatment of all organizations, whether chartered or otherwise, organized outside of the State of Wisconsin, alike, and the imposition of the same restrictions upon them. As these restrictions must be held unconstitutional as to some of them and as the court cannot give effect to the intention of the Wisconsin legislature, is not the court assuming legislature powers itself in practically recasting the law so as to treat in separate classes what the legislature intended should be treated in the same class?

The Question of Impairment of Contract Obligations.

What we have said heretofore was in discussion of such parts of the opinion as had any bearing upon the application of the statute irrespective of its interpretation and irrespective of its constitutionality. In the discussion

of the question whether the application of a statute to this contract offends against the United States Constitution as impairing the obligations of the contract, the opinion seems to us to confound the question whether a party can contract in such a way as to *restrict legislation* of the state, with the question whether the legislation of a state can be so *applied* as to impair the obligations of a party's contract. The opinion also apparently regards a small impairment of the obligations of the contract as no impairment. No logical distinction can exist between holding that failure by one party to a contract to pay $25 releases the other from the contract any more than the failure to pay $25,000. The court seems to be unduly impressed with the fact that here it is a foreign corporation that is raising the question of the unconstitutionality of the application of a certain statute. Suppose the contract had been between two individuals, and the statute had provided that no contract, the performance of which should last longer than a year, should be valid unless reduced to writing and recorded with a payment of a fee of $25. The case would be precisely analogous, yet we cannot believe that this court, or any other court in the country, would hold that such a statute could have application to a contract validly enacted before the statute was passed. Could it make any difference that here a foreign corporation is concerned and not an individual?

Toward the bottom of page 3 of the court's opinion we find these words:

> "Again, we need not consider in its full breadth whether or how far, * * * a corporation, by making a contract reaching years into the future, can exonerate itself from all police or license laws."

This is certainly absolutely unfair to our case and to our

contentions. A law authorizing foreign corporations to do business in a state is certainly not a police regulation. It effects neither the health nor the morals nor the safety of the people. Ever since the Dartmouth College case it has been supposed that giving a charter to a corporation was not an exercise of police powers, but was an act of ordinary legislation, or else the making of a contract. General incorporation laws are affected by the same rules as private acts of incorporation and general laws prescribing the terms on which foreign corporations can do business are not in this respect different. A state cannot contract away police powers. It can grant inviolable charters to corporations. Even where the charters granted for the regulation of the corporations are not contracts they nevertheless cannot be regarded as partaking of the nature of police regulations, or else when they were contracts they would still partake of that nature and not be binding on the state.

The opinion is in error in assuming that we have contended that a corporation by making a contract contemplating a series of years could absolve itself from the police or license laws of the state. As we expressly pointed out in our brief, the question is not between the State of Wisconsin and the Diamond Glue Company. We are not contending that this contract releases the Diamond Glue Company from the obligations to obey the laws of Wisconsin as to all business done there. What we do contend is that the laws of Wisconsin cannot be stretched to relieve the defendant in error from the obligations of its contract, valid when made.

This Court has Overruled the Supreme Court of Wisconsin in the Construction of Wisconsin Law.

The point in the whole opinion which seems to show to us most clearly that our case has not received the attention it merits or the mature consideration of the court is that in the opinion filed the court has disregarded the well-known rule that the Supreme Court of the United States in construing the statute of a state will follow the rules of construction used by the Supreme Court of that state. The court has run counter to the vast weight of authority as to the construction of a clause in a statute suspending its operation until some future date, including the only three cases found by counsel for either party, in which a contract made between the enactment and the going into force of a statute is considered. We refer to

National Home Building & Loan Ass'n v. *Black*, 153 Ind., 701.

Cargill v. *Powers*, 1 Mich., 369, 370, and

Mix v. *Vail*, 86 Ill., 40.

In the first two of these cases the "suspension clause" is contained in the statute itself, as in the case at bar. In fact, *Cargill* v. *Powers* is still more nearly like the case at bar, because the act in that case was part of "revised statutes," which did not go into effect until the year after they were enacted.

In regard to our authorities the opinion says in this connection:

> "Statements made with a different intent in some decisions, to the effect that suspended statutes are to be read as if passed on the day when they go into operation, do not apply to a case like this. Such statutes

can be read in that way for the purpose of the operation which is suspended, but not for all."

The writer of the opinion must have overlooked the two first cases above cited, where, in so far as this point is concerned, the facts are absolutely analogous. In the following cases also, the "suspension clause" is contained in the act itself. Therefore, if the "suspension clause"—following the reasoning of the opinion—had been in effect, all persons would have been notified of the provisions of the act and the decisions would have had to be different.

Commonwealth v. *Fowler*, 10 Mass., 290, 300.

Larrabee v. *Talbott*, 5 Gill. (Md.), 426, 441.

State v. *Bond*, 49 N. Car., 9.

Dewart v. *Purdy*, 29 Pa. St., 113, 117.

State v. *Messmore*, 14 Wis., 163, 175.

In the other cases cited by us in our brief the provisions suspending the operation were a part of the constitution of the state or provisions of another general law. Consequently, in those cases the "suspension clause" was necessarily in force in spite of its effect in postponing the act, and yet, in those cases, the fact that the "suspension clause" was in force did not operate to give notice of the provisions of the acts which it might suspend.

Jackman v. *Garland*, 60 Me., 133.

Sammis v. *Bennett*, 32 Fla., 458, 460.

Charliss v. *Lamberson*, 1 Ia., 435, 443.

Rice v. *Rudiman*, 19 Mich., 125, 135, and *Mix* v. *Vail*, above mentioned.

Of course, the implied reasoning of the opinion is obvious—the "suspension clause" being in force, as it says,

is notice that at a future date a certain body of laws,—if they are not repealed or modified, or amended, before that time,—will be in force. But, where, as in the case at bar, the statute is contained in an entire revision of the statute law of the state, it would not seem to be a very definite notice to each of the enactments. At any rate it did not so appear to the courts in *Cargill* v. *Powers,* and *State* v. *Bond, supra,* to have that effect. There does not seem to be a very strong distinction between such a "suspension clause" contained in a general revision of the statutes, and such a "suspension clause" as we have in Illinois to the effect that all acts of the legislature, unless an emergency clause is attached, shall go into force the first day of July after their enactment. According to the reasoning of the opinion, the well known existence of such a provision in our constitution must keep all the inhabitants of the state on the *qui vive* in regard to the doings of the legislature from day to day, as laws may be enacted, which though they are not to have effect until the first of July following, nevertheless, may be binding upon the citizens before that date. See, however,

Mix v. *Vail, supra.*

It is universally agreed that one of the objects of postponing the going into effect of a statute is to enable the citizens of the state to become acquainted with its provisions so that they shall not be taken by surprise and have the law affecting their daily dealings suddenly changed. But the interpretation given by the opinion to the "suspension clause" in this case nullifies that purpose completely. The instant the Wisconsin revised statutes were enacted everybody was bound to take notice of them in spite of the provision giving them a year or so to get acquainted with them,

for anything done by them which might have effect after September 1, 1898, was likely to be nullified by the statute. It may be said that if any arrangements were to be made extending after that date, in such case, the parties making them could look up the law. But that contains the fallacy of charging all citizens of Wisconsin and *all doing business there* with notice that there is a law to look up, and so defeats the purpose of the legislators in postponing the operation of the law. If all the people in spite of the postponement of the operation of the law are required to take notice of its postponed operation at the moment of its enactment, no satisfactory reason can be given for its postponement. It is to be presumed that the new law is an improvement over the old, or it would not be enacted. If, then, a period before its going into effect is not to be allowed the people for getting acquainted with it, but they are immediately given notice of its provisions, by the very fact that it is postponed, then it would certainly be better to put those provisions of which they have notice into force immediately.

If a legislature desired to give citizens of a state a year or a month or a week to become acquainted with the provisions of the law, during which intervening time they were not to be charged with notice of it in any of their transactions, would not such legislature in carrying out such purpose add a simple clause postponing the taking effect of the law? As it is universally agreed that the laws in force when contracts are made enter into its obligations and that these obligations cannot be impaired by an act of the legislature, if a statute enacted, but not in force, becomes part of the obligations of a contract, as the opinion implies, what becomes of the obligations in case the statute is repealed before it ever becomes a law? The rule laid down by the court

leads to the dilemma, either that a law enacted after the contract is made affects the contract and therefore impairs its obligations, or that an act never in force as law nevertheless entered as law into the interpretation of a certain contract.

But we realize that this court is in a position, if it chooses, to disregard in the construction of this statute all decisions outside of the State of Wisconsin that bear on the subject. They are authorities, it is true, and they seem all one way, but they would not be absolutely binding on the Supreme Court of Wisconsin and they cannot be binding on this court. But the decision of the Supreme Court of Wisconsin in similar cases is binding in the construction of a Wisconsin statute. In *State* v. *Messmore, supra*, so far as the constitutionality of the "suspension clause" is concerned, the facts are precisely like those in the case at bar. In that case the act was approved March 30, 1861, was published April 4, 1861, and *by its terms* went into effect April 10, 1861. The court says (page 175):

> "We do not, however, hold that the *judge was bound to take notice of the change* or prepare to remove until the act was to go into actual operation. In these times of fluctuating and uncertain legislation, it would be enough that he prepared for the contingency when it actually happened. * * * For aught that he knew or might suppose, *the law might have been repealed, or further suspended*, before the day fixed for its taking effect."

When, therefore, the Wisconsin Supreme Court has said that a judge of a court of general jurisdiction is not bound to take notice of the terms of an act before it goes into effect, is it not acting in utter disregard of the rule of construction laid down by that court to hold that a foreign corporation is bound to take notice of the terms of an act of Wisconsin before it goes into effect? As the Wisconsin court well remarks, it may be repealed before that time comes.

This court has repeatedly held that where the Supreme Court of a state has construed the state constitution or legislation as authorizing the making of certain contracts, then it was not at liberty to declare other similar contracts, made after such decisions, invalid on account of such constitution or legislation. For if a court were allowed so to shift its construction, citizens who have entered into contracts and undertakings in reliance upon the former decision, would, in effect, have the obligations of their contracts impaired by the subsequent decision. Yet, the opinion filed in this case allows this court, in construing a Wisconsin statute, to vary the construction of a similar statute by the Wisconsin Supreme Court so as to deprive a litigant of the benefits of his contracts made perhaps in reliance upon such former decision. Does this court arrogate to itself power in construing the statutes of a state which in similar cases it has denied to the state supreme courts?

We have attempted to set forth the reasons why we believe the plaintiff in error is entitled to a rehearing of this case by this court. To us the rights of plaintiff in error seem clear. The arguments advanced by us in our original brief seem valid and do not seem to have been answered in any respect by the opinion of the court on file. For this very reason that the matter seems to us so clear, we have found it hard to frame in language at all satisfactory to us the reasons why we think the court's opinion erroneous.

We of course know that we may be wrong in our views on this controversy, but we very respectfully ask the court for a reconsideration of the questions involved, believing that it will conclude its former decision was a mistake.

Respectfully submitted.

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No. 119.

NOV 15 1902
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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1902.

No. 119.

Filed Nov. 15, 1902.

THE DIAMOND GLUE COMPANY,

Plaintiff in Error,

vs.

THE UNITED STATES GLUE COMPANY,

Defendant in Error.

BRIEF OF DEFENDANT IN ERROR.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF WISCONSIN.

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SUPREME COURT OF THE UNITED STATES.

THE DIAMOND GLUE COMPANY,

Plaintiff in Error,

vs.

THE UNITED STATES GLUE COMPANY,

Defendant in Error.

BRIEF OF DEFENDANT IN ERROR.

This action was brought for damages by reason of the refusal of the defendant in error to permit further performance of an executory contract.

This contract was made June 25, 1898, and provided:

That the defendant in error, a Wisconsin corporation, should within sixty days, select a site and with the least possible delay thereafter, erect, equip and complete a glue factory on this site.

That plaintiff in error, an Illinois corporation should

1. Supervise the construction of the factory.

2. Should "*have the management of the manufacturing in said factory and operate the same for*" defendant in error and furnish a superintendent and give the factory personal supervision.

3. Equip the factory and supply it with a capable superintendent.

4. "*Control, handle* and sell the entire output, including glue and by-products of such factory."

5. Refrain from manufacturing, at any of its factories, either hide or calf glue after the factory of defendant in error should go into operation, during the life of the agreement.

6. Guarantee all sales.

7. Receive a commission on sales for its compensation.

The contract was to endure for five years. (Pr. Tr., p. 10-11.)

Within the sixty days mentioned, defendant in error selected a site in Milwaukee County, Wisconsin, and proceeded to erect and equip and complete a glue factory thereon, (Pr. Tr., p. 4-25) and began in November or December, 1898, to erect a factory. (Pr. Tr., p. 35-54.) The factory was completed and went into operation about the 25th of July, 1899. (Pr. Tr., p. 5-25.)

Both in its original complaint and in its amended complaint, the plaintiff in error alleges specifically that it has, as stipulated in the contract, refrained from manufacturing either hide or calf glue at any of its factories, and closed down its factories which had been used for that purpose, and generally, that it has in all respects, fully complied with the terms and conditions of the contract to be performed on its part. (Pr. Tr., p. 5-25.)

The defendant in error pleaded as one defense, that practically all the things which were done, or attempted to be done by the said plaintiff under the contract set out in the complaint, were done by it after the first day of September, 1898.

That said plaintiff has never filed, or caused to be filed in the office of the Secretary of State of the State of Wisconsin, any copy of its charter, articles of association or incorporation, or in any way complied with the statutes of the State of Wisconsin in regard to foreign corporations; or in any way complied with, or performed any of the provisions of Sec. 1770 B of the Revised Statutes of the State of Wisconsin for the year 1898; and that all acts of the plaintiff under the alleged contract after the first of September, 1898, were done in violation of the laws of the State of Wisconsin, and that the contract was, and is wholly void as to, and on behalf of the plaintiff; and that it has and can have no cause of action arising therefrom, for the reason that the attempted performance of the contract was in violation of the statutes.

Sec. 1770 B. of the Revised Statutes of Wisconsin, or so much thereof as is germane to this case, is as follows:

"No corporation . . . incorporated or organized otherwise than under the laws of this state (with certain exceptions, not material to this case), shall transact business, or acquire, hold or dispose of property in this state until such association, company, partnership or corporation shall have caused to be filed in the office of the Secretary of State, a duly authenticated copy of its charter, articles of incorporation or of co-partnership, and all amendments thereto which may have been made, while it shall continue to do business therein . . . The failure to comply with any of the provisions of this section shall, for the first such violation, subject the association, company, corporation or co-partnership, or any agent, officer or person acting for it in this state, to a penalty of five hundred dollars, to be sued for and recovered, etc. . . . (with penalty for subsequent violations). Every contract made by or on behalf of any such association, company, corporation or co-partnership affecting the personal liability thereof, or relating to property within this state before it shall have complied with the provisions of this section, shall be wholly void on its behalf, and on behalf of its assigns, but shall be enforcible against it or them."

This section further provides that such filing of its articles shall be deemed a stipulation that process against the corporation may be served on the Secretary of State of Wisconsin, with safeguards as to notice to be given to the corporation by such state officer.

At the time this suit was commenced, (February 5, 1900) and at the time of the alleged breach of the contract in December, 1899, (Pr. Tr., p. 13.) and at the time of the completion of the factory, this statute stood amended,—all references to co-partnerships having been stricken out by Sec. 27, Chap. 351, Laws of Wis. for the year 1899. Approved May 4, 1899.

This amendment also added to Sec. 1770 B. the following: "No corporation which has deposited in the office of the Secretary of State a written instrument in compliance with Sec. 1750 A. of the Annotated Statutes, shall be required to make any further deposit of its articles under this act."

There is not, and never was any section of the Revised Statutes of Wisconsin known as Sec. 1750 A.

In 1889 Messrs. Sanborn & Berryman issued what are called the Annotated Statutes of Wisconsin, which the re-

vision of 1898 (Sec. 4977) provides may be referred to as the "Annotated Statutes." These statutes, compiled by Messrs. Sanborn & Berryman, were adopted by the Wisconsin Legislature by Chap. 222 of the laws of 1889, and therein designated as "The Annotated Statutes of Wisconsin."

Sanborn & Berryman's Annotated Statutes, p. 2141.

In these "Annotated Statutes" occurs a section known as 1750 A., but it applies only to corporations and associations "formed for the purpose of transporting of passengers or property, either by boats, vessels, rail, stages or other means,"—being Chap. 193 of the Laws of Wisconsin for 1880, as amended by Chap. 189 of those laws for the year 1881.

So that this reference to Sec. 1750 A does not concern the case at bar.

To this defense challenging the legality of the contract, and of performance under it, plaintiff in error demurred for insufficiency. (Pr. Tr., p. 21.)

Upon argument, this demurrer was overruled. (Pr. Tr., p. 22.) Upon this demurrer, the question as to the validity and applicability of the Wisconsin Statute mentioned, was considered and determined, and the learned District Judge handed down an opinion sustaining the defense and directing that the demurrer be overruled, and giving his reasons therefor. This opinion is found at pp. 30-32 of the printed transcript.

The demurrer of the plaintiff in error to this defense was never withdrawn; but an amended complaint was served, differing from the original complaint in that it alleged that the defendant operated the plant; whereas, in the original complaint it was alleged that the plaintiff operated the factory.

The original complaint, the demurrer to this defense, and the opinion of the Court sustaining the defense and overruling the demurrer, are made a part of the bill of exceptions. (Pr. Tr., pp. 29-32.)

Various other defenses were interposed which, in so far as they are here for consideration, appear in the motion to direct a verdict, as hereinafter set out.

Upon the evidence adduced, the defendant below (the defendant in error here), moved the Court to direct a verdict in its favor, for the reasons:

1. That the defense first referred to was established, namely: That the plaintiff was a foreign corporation, and had not filed its articles in the State of Wisconsin, nor complied with its laws.

2. On the ground that the contract sued upon contains a stipulation essential to it, which is in restraint of trade, and in violation of the statutes of Wisconsin, which prohibit combinations or arrangements to restrict production of any article which is an article of commerce in the state.

3. That it appears by the plaintiff's own proof that as agent of the defendant, it has been disloyal, in that it has not diligently and properly attempted to sell the output of the plaintiff, but has represented competing concerns, in violation of the duties assumed by it as an agent of the defendant.

4. That it appears by the plaintiff's proof that it violated its agreement to refrain from the manufacture of hide and calf glue, in that, after the execution of the contract with the defendant the plaintiff undertook and carried on the manufacture of hide and calf glue in an establishment in Gowanda, N. Y., whose output was greater than the total amount of this kind of glue made by the plaintiff.

5. That the contract of the plaintiff is *ultra vires* of the plaintiff.

6. That it appears from the plaintiff's proof that it had failed to perform the conditions of the contract, namely: the sale of the output, or of a substantial part of the output of the factory of the defendant, and had repudiated its obligation to sell or that any obligation rested upon it in the premises. (Pr. Tr., p. 109.)

The Court below directed a verdict for the defendant, holding that the contract was for the transaction of business in the State of Wisconsin, and that inasmuch as the plaintiff had not complied with the laws of that state, it had no right to perform its contract, and hence could maintain no suit for its breach. (Pr. Tr., pp. 110-111.)

The learned District Judge in directing this verdict made the following statement: "I have been, through the trial and the examination, quite strongly impressed with another view, and that is, of the showing of the doing of business by the plaintiff, notwithstanding the contract, with other parties, which it seemed to me, would be a business necessarily in antagonism to that of the defendants in this case; and if so, that of itself, would be a breach on their part, which would authorize the setting aside of the contract by the defendant. The testimony in that regard entirely appears on the plaintiff's showing and is undisputed,—the fact of the transaction with the Gowanda Company. I deem it proper to allude to it, but it would not make any difference with my ruling." (Pr. Tr., p. 111.)

The testimony referred to by the trial judge is that of Mr. Morron, Vice-President of the plaintiff in error, found at p. 50 of printed transcript: "I think we sold about 500,000 (pounds) for the U. S. Glue Company. We got the rest of the hide and calf glue handled by us from the Gansler & Fischer factory, Gowanda, N. Y., which was less than was sold for the U. S. Glue Company. I think the Gowanda factory went into operation in the early part of 1899. Our relations to that factory were under practically the same contract as with the U. S. Glue Company. That contract was made in 1898. The estimated capacity of the Gowanda factory is a million and a half to two million pounds." At pages 52-53 of the printed transcript, he testifies that they sold about 118,000 pounds of hide and calf glue from the Gowanda factory.

Validity and scope of the Wisconsin Statute.

The Supreme Court of the State of Wisconsin has, since the trial of the instant case, passed upon the statute under consideration, and has not only held it to be a valid statute, but has given to it the broadest effect which its words admit.

This decision of the court of last resort of the State of Wisconsin, at least as to the construction to be given this statute, will be adopted and followed by this court.

Waters-Pierce Oil Co. vs. Texas, 177 U. S., 28-43.

The decision referred to is Ashland Lumber Co. vs. Detroit Salt Co., et al., 89 N. W. Rep., 904, the decision having been rendered on the first day of April, 1902.

The Wisconsin court in its opinion construes the law as follows: "We must hold that the words 'shall be wholly void on its behalf, and on behalf of its assigns, but shall be enforcible against it and them,' mean just what they say; and, if they are valid, they render the contract in question absolutely void and a nullity, in so far as it is sought to be enforced on behalf of the defendants by way of counter claim in this action."

The circumstances of that case rendered the application of this rule exceedingly harsh, since the party actually affected was a natural person, who was associated with a foreign corporation as a co-partner or co-adventurer, and so had to trace his right of action through the contract.

On the question of the validity of the statute, the Wisconsin court bases its conclusion upon the decisions of this court beginning with Paul vs. Virginia, 8 Wall., 168-181; and the Wisconsin Court concludes: "We must hold that the statute in question is valid, however harsh its provisions may seem to be."

It is established, therefore, that the decision of the Court below was correct, if the statute in question is applicable to the case at bar.

This Court has so many times re-affirmed the doctrine of Paul vs. Virginia, that there can be no longer any question that the power of a state to totally exclude foreign corporations, or as a condition of recognition, to impose such terms and conditions as the state may think proper, is plenary, except in one instance only, namely: "Where a corporation created by one state vests its right to enter another and to engage in business therein, upon the federal nature of its business."

Hooper vs. California, 155 U. S., 648-652.
Cooper Mfg. Co. vs. Ferguson, 113 U. S., 727.

It will be noted that the statute of Wisconsin in the first instance absolutely prohibits a foreign corporation from transacting business, or acquiring, holding or disposing of property in the state until it shall have complied with the law; and in the second place, makes any breach of this provision of the statute penal.

Without being obliged, therefore, to have recourse to the last section of the statute expressly avoiding any contract made in contravention of the law, the statute makes illegal the continuance of the acts which defendant refused to permit plaintiff to perform; and these acts being declared illegal by the statute, no court sitting in that state could give to plaintiffs any redress for the refusal of the defendant to permit a continued violation of the law.

Cooper Mfg. Co. vs. Ferguson, 113 U. S., 727-733.
Bank vs. Owens, 2 Peters, 527-539.
Miller vs. Ammon, 145 U. S., 421-426.
Aetna Ins. Co. vs. Harvey, 11 Wis., 394.
McCanna & Fraser Co. vs. Citizens, &c. Co., 76 Fed. Rep., 420 (U. S. Cir. Ct. App.).

It was suggested in the Court below that the fact that the statute in question purported to cover cases of co-partnership as well as corporations made it unconstitutional, and the case of Barnes vs. People, 168 Ill., 425, was cited to support this proposition.

Undoubtedly the statute was void as to natural persons residing in other states, and the Illinois case cited holds this, and no more. The claim that the attempt of the legislature to cover co-partnerships infected the statute so as to make it wholly void, can not be sustained; since it is perfectly apparent upon the face of the act, and from the subsequent action of the Wisconsin legislature that the inclusion of partnerships was not the main purpose of the act, or in any way essential to it, but is separable and may be treated as null without affecting the main purpose of the statute.

Cooley Const. Limitations, 209, 211.

Allen vs. Louisiana, 103 U. S., 80, 83.
Virginia Coupon Cases, 114 U. S., 305.
Baldwin vs. Franks, 120 U. S., 678, 689.

The case does not come within the exception of Interstate Commerce.

The power of the state in the premises is limited only by the implication of exclusion arising from the grant of power to Congress to regulate interstate commerce. That which the state can not regulate is merely that which Congress may regulate.

It has been held that the power of Congress in this regard is confined to actual intercourse, and not to contemplated sales.

Coe vs. Errol, 116 U. S., 517.

That manufacturing corporations and all other corporations whose business is of a local and domestic nature are subject to the control of the state.

Crutcher vs. Kentucky, 141 U. S., 47, 49.

And this, irrespective of the proposition that a part of the business of such manufacturing corporation may be the sale of its products in other states.

U. S. vs. E. C. Knight Co., 156 U. S., 1, 13.
Prentice & Egan's Commerce Clause, p. 326, et seq.
Hopkins vs. U. S., 171 U. S., 578.

Examining the contract in controversy, we find that as conditions precedent to any liability on the part of the defendant, it was agreed that the plaintiff "shall have *the management of the manufacturing in said factory, and shall operate the same* for the party of the first part and furnish a superintendent . . . shall give said factory such personal super-

vision as may be necessary from time to time in the operation of the same."

That the plaintiff should keep the factory supplied with a capable superintendent.

That it shall "*control*, *handle* and sell the entire output of the factory." (Pr. Tr., p. 11.)

It is as plain as the English language can make it that this is a stipulation for the "transaction of business" within the State of Wisconsin within all definitions.

The circumstance that some of the products might be sold without the State of Wisconsin, and so moved across the boundary of that state, is accidental and not of the essence of the contract. Thus the case comes directly within the case of

U. S. vs. Knight Co., *supra*, and
Hopkins, vs. U. S., *supra*.

The terms and meaning of the contract.

It will be noted that by its terms the contract was transitory. There was no stipulation that the factory should be located in Wisconsin. Defendant could have performed on its part by selecting a site in Missouri or in any other state.

The site was actually chosen about the first of July, 1898, some time after the execution of the contract. (Pr. Tr., p. 34.)

The factory was completed the latter part of July, 1899. (Pr. Tr., p. 35.)

So that when the five-year term began, during which plaintiff in error had agreed to transact business in Wisconsin, i. e., operate the factory, etc., the law was operative as amended by the Act of 1899.

Two things, therefore, appear:

1. That the localization of the contract was no part of the agreement itself, but was subsequently effected by the acts of the parties; and,

2. That by the contract and these subsequent acts, the plaintiff in error intruded itself into the State of Wisconsin, for a long term beginning at a then future date.

And the claim made here by plaintiff in error is that by so localizing the contract, the parties denuded the state of a portion of its sovereignty.

Every executory contract of a corporation to transact business in a foreign state is conditioned as matter of law upon the continuance of license from that state to come within its borders.

No foreign corporation can, by making a long-term executory contract, disable a state from excluding it from its territory.

It is rudimentary that a corporation has no legal existence outside of the state creating it. Recognition of it by other states is a matter of grace or comity upon which in the nature of things can be based no vested right to continued recognition.

This would seem axiomatic. A foreign corporation transacts business within another state by virtue of a license which is at all times revocable, unless it can be contended that indulgence on the part of the state destroys its sovereignty in this regard.

It will be noted that here is no question of property rights acquired under an executed contract, but the question is purely and simply, whether a foreign corporation by its own executory contract, can abridge or destroy the powers of the sovereign.

It is as though the permissive user of a right of way should claim to acquire a vested right therein by binding himself by contract with a third person to use the right of way for a term of years.

It would seem to be clear that a foreign corporation finding itself within the State of Wisconsin as a matter of grace, could not by its own act acquire any vested right, as against the state, to continue domicile therein.

As stated by the Missouri Court in

State, ex rel Crow vs. Fireman's Fund Ins. Co.,
45 L. R. A., 363, 377.
s. c., 152 Mo., 1,

it is a misconception to suppose that any corporation can by complying with existing comity laws, acquire any vested rights which can not be affected by subsequent changes in such laws.

Doyle vs. Ins. Co., 94 U. S., 535.

"Having the right to impose such terms as it may see fit upon a corporation of this kind as a condition upon which it will permit the corporation to do business within its borders, the State is not thereafter and perpetually confined to those conditions which it made at the time that a foreign corporation may have availed itself of the right given by the State, but it may alter them at its pleasure. In all such cases there can be no contract springing from a compliance with the terms of the act, and no irrepealable law, because they are what is termed "governmental subjects," and hence within the category which permits the legislature of a State to legislate upon those subjects from time to time as the public interests may seem to it to require."

Mutual Life Ins. Co. vs. Spratley, 172 U. S., 602, 621.

The statute in question cannot be said in any way to impair the obligation of a contract.

The contract in question was made on the 25th day of June, 1898. (Pr. Tr., p. 3.) The statute is part of the Revised Statutes of Wisconsin for the year 1898. These were passed at a special session of the legislature for the year 1897, and were approved by the Governor August 20, 1897. It was provided by Chapter 379 of the laws of 1897 that "upon the preparation of said statutes of 1898, before the same shall be published, there shall be appended thereto a certificate of two of the Justices of the Supreme Court that the provisions of this Act, of said Revision Bill and said Chapter 306 of the Laws of 1895, have been complied with in their preparation and publication, which certificate shall be published in connection with said statutes, and the same shall be evidence as provided in said Chapter 306 of the Laws of 1895."

The Chapter cited also provides "that the said statutes of 1898 shall take effect and be in force on and after the first day of September, 1898."

The certificate of the Justices of the Supreme Court required was made and dated on the 2d day of May, A. D. 1898. (R. S. of 1898, p. 2922.)

By said Chapter 306 of the Laws of 1895 Messrs. Sanborn and Berryman were authorized to prepare and publish the public general laws of the state which should be in force at the close of the session of the legislature of 1897, and when published such statutes were to be *prima facie* evidence of their passage and publication and should be known as the "Wisconsin Statutes of 1898."

The certificate of the Justices of the Supreme Court certifies that "the preparation and publication of said Statutes of 1898 has been and is in all respects in compliance with all of said acts."

It will appear then that the statute in question was complete as a legislative act at the time the contract in controversy was executed, although the time when the statute should become operative was postponed until the succeeding September by the provisions of the statute itself. (Section 1978.)

Workman vs. Worcester, 118 Mass., 168.

The contract under consideration was executed June 25, 1898, nearly two months after the statutes had been approved, certified and published; and the performance of the contract was not to be entered upon, and was not entered upon in fact, until after the statutes had gone into effect. (Ground was not broken for the erection of the factory until November, 1898. Pr. Tr., p. 35.)

The contract did not contemplate any performance, or entry upon performance, until after the law should have become fully operative. The agreement stated that a site should be selected by the defendant by the 25th of August, 1898, and *thereafter* the building of the factory should be commenced. The performance of the main part of the contract,

namely,—the operation of the factory, was of course not to begin until after the completion of the factory, which would necessarily be long after the 1st of September, 1898, and occurred in fact in July, 1899 (Pr. Tr., p. 35.); and the contract was by its terms to endure for a term of five years from the last named date.

Thus at the time the contract was entered into, performance under it had been forbidden by the legislature, except upon compliance with the terms of the act. The effect of the statutes is the same as though it had been an enactment operative *in presenti* and forbidding the transaction of business within the State of Wisconsin after September 1, 1898, except upon compliance with certain conditions.

The error alleged, and upon which the jurisdiction of this Court depends, is a violation of that part of Section 10, of Article I, of the Federal Constitution, reading as follows: "No state shall * * * pass any * * * law impairing the obligation of contracts."

After the execution of the contract in question, no law was passed by the State of Wisconsin affecting it, nor has the legislature of that state acted in this regard since the contract was made. The law which defendant relied upon and which the Court below says, made illegal the performance of this contract, was passed by the State of Wisconsin before this contract was entered into. The mere fact that its operation was postponed until a later date does not make the legislative act concurrent in point of time with the later date.

This Court has held that before it can be asked to determine whether a statute has impaired the obligation of a contract, it must be made to appear that there was a legal contract subject to impairment.

> New Orleans vs. New Orleans Waterworks Co., 142 U. S., 79.

As has been stated, at the time of the passage of this act, there was no contract subject to impairment, and it seems

obvious that a statute can not impair the obligation of a contract which did not exist when it was enacted. This was expressly held in

Lehigh Water Co., vs. Easton, 121 U. S., 388-391.
Pinney vs. Nelson, 183 U. S., 144-147.

Again, the obligation of this contract was not in any way impaired, for the reason that the contract, having been made after the passage and publication of the statute, it was necessarily made with a view to the statute, and subject to its terms. The plaintiff was bound to take notice that the thing which it bound itself to do, namely: To operate this factory in Wisconsin, would be illegal unless it complied with the laws of that state. As is held by the Illinois Court in

Ford vs. Milk Shippers Assn., 155 Ill., 166-181.

And as is inferentially held in

Pinney vs. Nelson, *supra.*

And directly decided in

Stine vs. Bennett, 13 Minn., 138-143,

the plaintiff and all other persons were required in June, 1898, to take notice of the existence and terms of this statute "and that at the time appointed, its provisions would be operative for all purposes."

In other words, this statute being a part of the law at the time the contract was entered into, supplied in itself, one of the measures of the obligation of the contract. This statute entered into the contract and was part of it; and it would be a contradiction in terms to claim that it impaired the obligation which it constituted and measured.

Griffin vs. Mayor &c., 5 Mart. La., 279.
See Johnston vs. Fay, 16 Gray, 144.

The obligation on the defendant in this contract was to perform the same, provided the plaintiff made performance on its part legal by compliance with the law.

The statute in question, even if retroactive, did not impair the obligation of the contract.

All that the statute in question required, was that the plaintiff in error should file its Articles with the Secretary of State of the State of Wisconsin, and so submit itself to the jurisdiction. Compliance was in no way difficult, and the expense attending compliance was simply the payment of twenty-five dollars.

The Legislature, in the exercise of its undoubted right to impose conditions upon foreign corporations, "passed a law which was just, easy to be complied with and necessary to secure, in many cases the exercise" of the right of the domestic party to the contract.

Curtis vs. Whitney, 13 Wall., 68-71.

In that case and in Jackson vs. Lamphire, 3 Pet., 290, this Court held that the obligation of a contract is not necessarily impaired by a statute which affects it retroactively, or because such statute enhances the difficulty of performance to one party, provided that it leaves the obligation of performance in full force.

Under the act in question here, no legal right of plaintiff was taken away. "He is simply required to observe a formality imposed by the statute. By the observance of this formality all his rights are preserved to him unimpaired."

Coulter vs. Stafford, 15 U. S. App., 118-123.

This Court in

McCracken vs. Hayward, 2 Howard, 608, 612,

defined the obligation of a contract as "the law which binds the parties to perform their agreement." "The obligation of the contract consists in its binding force on the party who makes it. This depends on the laws in existence when it is made; these are necessarily referred to in all contracts and forming a part of them as the measure of the obligation to perform them by the one party, and the right acquired by the other."

And this is impaired only when a subsequent law "affects to diminish the duty or to impair the right."

Or as stated in

Ogden vs. Saunders, 12 Wheaton, 213, 259,

"The law of the contract forms its obligation" and in the same case, at page 302, "the obligation does not inhere and subsist in the contract itself, *proprio vigore*, but in the law applicable to the contract."

Cooley Constitutional Limitations, 344-345.

It was styled by the Roman lawyers "juris vinculum," being the duty of performance imposed upon the one party and the right to exact performance conferred upon the other. The statute expressly saved the right of plaintiff in error and in no way purported to relieve defendant in error from its duty.

The judgment should be affirmed because the plaintiff's proof shows conclusively that it had substantially failed and refused to perform the contract on its part.

The plaintiff had three factories at which in June, 1898, it was manufacturing hide and calf glue. (Pr. Tr., p. 33.) A part of the contract on its part was that "during the life of this agreement, beginning as soon as said factory is in operation, the party of the second part (plaintiff in error) is to refrain from manufacturing either hide or calf glue at any of their factories." (Pr. Tr., p. 11.) The amended complaint of the plaintiff alleges (Pr. Tr., p. 25) that "as soon as said factory was in operation said plaintiff then refrained, and has at all times since refrained, from manufacturing either hide or calf glue at any of its factories, and did thereupon close down its factories before that time used for the manufacture of hide and calf glue, and has not operated the same since said date."

The testimony of the plaintiff discloses that it did close down its factories, but that after the contract was made with the defendant, plaintiff made a similar contract with a manufacturing concern in Gowanda, New York, and did thereafter operate the factory at Gowanda, which had a capacity of from a million and one-half to two million pounds; that the

plaintiff manufactured hide and calf glue at this factory and sold it in the market (Pr. Tr., p. 50); and it appears from the testimony of the plaintiff (Pr. Tr., p. 49) that its sales for the year 1899 of hide and calf glue were upwards of a million and one-half pounds, of which only 500,000 pounds came from the defendant in error. (Pr. Tr., p. 50.)

The following dilemma presents itself to the plaintiff in error:

Either its agreement with the defendant in error to refrain from the manufacture of hide and calf glue was in unreasonable restraint of trade, and therefore tainted the whole contract and made it illegal, so that no action could be based on it; or

The stipulation was justified solely on the ground that it was necessary to enable the other party to the contract to secure the other benefits stipulated for therein, namely: loyalty on the part of the plaintiff in error as its exclusive sales agent.

As to the first alternative, Sec. 1791j of the Revised Statutes of Wisconsin forbids corporations organized under the laws of Wisconsin "from entering into any combination, conspiracy, trust, pool, agreement or contract intended to restrain or prevent competition in the supply or price of any article or commodity in general use in this state, or constituting a subject of trade or commerce therein, or . . . to limit or fix the amount or quantity thereof to be manufactured, mined, produced or sold in this state." This statute is merely declaratory of the common law, making it specifically applicable to domestic corporations, with the penalty of forfeiture of their charters.

Section 3207 of the Revised Statutes of Wisconsin imposes this prohibition upon foreign corporations as well,—the last clause of the Section being as follows: "But such foreign corporation can not maintain an action founded upon an act or upon any liability or obligation, expressed or implied, arising out of or made or entered into in consideration of any act which the laws of this state forbid a corporation or any association of individuals to do without express authority of law."

Of course, if interstate commerce was contemplated, there would be the additional ban of the Act of Congress of July 2, 1890.

That no cause of action can arise out of a contract having this inherent vice, is settled by:

Cravens vs. Carter-Crume Co., 92 Fed., 479.
U. S. vs. Addyston Pipe & Steel Co., 85 Fed., 271.
Aff. by this Court, 175 U. S., 211-237.
U. S. vs. Knight Co., 156 U. S. 1-16.
Ford vs. Chicago Milk Assoc., 155 Ill., 166.

The law of Wisconsin on the subject of restraint of trade is well stated in

Richards vs. American Desk & Seating Co., 87 Wis., 503, 513:

"All restraints are presumed to be bad, but if the circumstances are set forth, that presumption may be excluded and the court is to judge of these circumstances whether the contract be valid or not." "It is essential in order not to be unreasonable, that the restraint imposed must not be larger than is plainly required for the protection of the party with whom the contract is made; and whether it is reasonable in a given case is a question not of fact *but of law for the Court.*"

It is urged that the restraint stipulated for is reasonable; this contention can be based only on the proposition that the stipulation "is plainly required for the protection of the party with whom the contract is made," namely, the defendant in error; and such protection could only be against disloyalty on the part of the plaintiff in error, as its exclusive sales agent, and to guard the defendant in error against competition in sales at the hands of its own agent.

Harrison vs. Glucose Sugar Refining Co., 116 Fed. Rep. 304-308 (U. S. Cir. Ct. App.).
Horner vs. Graves, 7 Bing., 735.

Conceding, then, that this stipulation was for the protection of the defendant, for that by it the plaintiff agreed that while it was the exclusive sales agent of defendant it would not be in the field as a competing manufacturer, then it appears conclusively by the plaintiff's own proof that it has violated this essential stipulation. It closed its own factories and built another, and was at the time of the alleged breach of the contract a competing manufacturer, and selling its own product in competition with the product of the defendant.

This is not a technical objection but is most substantial. It appears from plaintiff's proof that it had failed to sell more than 22 per cent. of the output of defendant's factory and that the continued accumulation of unsold product was certain to bankrupt the defendant. (Pr. Tr., pp. 48, 96, 97.) Of course the quantity of glue sold from the Gowanda factory satisfied the market to that extent and diminished to that extent sales of defendant's product and increased the accumulation.

As is intimated by the learned District Judge who tried the case, this is sufficient to disentitle the plaintiff to any relief. (Pr. Tr., p. 111.) "I have been through the trial and the examination quite strongly impressed with another view, and that is, of the showing of the doing of business by the plaintiff, notwithstanding the contract, with other parties, which, it seemed to me, would be a business necessarily in antagonism to that of the defendant's in this case, and if so, that of itself would be a breach on their part which would authorize the setting aside of the contract by the defendant. The testimony in that regard entirely appears on the plaintiff's showing and is undisputed—the fact of the transaction with the Gowanda Company."

Since the contract can be saved only by the theory that this provision was inserted for the protection of the defendant, that is,—to insure loyalty on the part of the plaintiff as its agent, it follows that any breach of this part of the contract on the plaintiff's part warranted and justified abandonment and repudiation by the defendant.

Were this stipulation not in the contract, the mere fact that plaintiff entered into a similar contract with the Gowanda concern, whereby it became a rival and competitor of the defendant, justified abandonment by the latter.

Dieringer vs. Meyer, 42 Wis., 311.

Mechem's cases on Agency, 289, 291, and cases cited.

Plaintiff was employed as the exclusive sales agent of the defendant. It was of the essence of such employment that it should not enter into any relations which interfered with or were antagonistic to the duty which plaintiff thereby assumed. This proposition is abundantly justified by the authorities cited, and seems to be clear as a matter of principle.

A fortiori, where a stipulation of this kind is expressed in the contract, it is of the essence.

It is uniformly held that where performance by the plaintiff goes to the root of the consideration of the contract, the failure to perform on the part of the plaintiff, or its refusal to perform, or the manifestation by it of an intention not to perform the contract according to its terms or to be bound by its terms, justifies the abandonment of the contract by the defendant.

F. L. & T. Co. vs. Galesburg, 133 U. S., 156.

Armstrong vs. St. P. &c. Iron Co., 48 Minn., 113, 119.

L. S. & M. S. R. R. vs. Richards, 30 L. R. A., 33, and note.

Plaintiff's covenant in this regard was plainly not independent, since "the question whether covenants are to be held dependent or independent of each other, is to be determined by the intention and meaning of the parties, as it appears on the instrument, and by the application of common sense to each particular case."

Lowber vs. Bangs, 2 Wall., 728-736.

Defendant in error was justified in refusing further performance under the contract for the reason that plaintiff in error had not only substantially failed to perform its contract in relation to the sale of the output, but had actually repudiated any obligation in this regard.

Defendant in error, in moving the Court to direct a verdict, based its motion in part upon the following ground: (Pr. Tr., p. 109.) "Sixth. That it appears from the plaintiff's proof that it had failed before the 1st of December, 1899, to perform the conditions on its part to be performed, namely: the sale of the output or of a substantial part of the output of the factory of the defendant, and repudiated its obligation to sell, or that it was bound to sell, or that any obligation rested upon it in the premises."

The Court below did not pass upon this ground of motion, but under the cases of

Whitney vs. N. Y. &c. R. Co., 102 Fed. Rep., 850, and

Currier vs. Trustees of Dartmouth College, 117 Fed. Rep., 44, (both in the Circuit Court of Appeals of the First District),

this defendant is entitled to rely here upon any ground which was fairly presented in its motion for direction of a verdict, regardless of the particular ground which determined the action of the Court. This is based on the reason stated in

Sullivan vs. Mining Co., 143 U. S., 431-434,

that if on all the facts in the case the judgment is one which must necessarily have been rendered, it must stand. And this case is within the suggestions of

Peck vs. Heurich, 167 U. S., 624-629,

inasmuch as it is clear beyond doubt that affirmance on this ground can not prejudice the rights of the plaintiff in error.

Without going into figures, it appears that large quantities of glue were being manufactured at this factory from day to day—from 10,000 to 15,000 pounds every day. (Pr. Tr., p. 58.)

It appears from the testimony of the executive officer of the plaintiff in error (Pr. Tr., p. 38) that the main reason given

by the defendant in error for refusing to continue the contract was the accumulations of glue unsold; that over 80% of the entire product of the factory was being piled up in the warehouse and that the plaintiff in error was selling but a very small portion of this output (Pr. Tr., p. 48); that when pressed as to their ability to sell a reasonable portion of this output, merely evasive answers were given (Pr. Tr., pp. 48 & 49); that in correspondence which took place preliminary to the refusal of the defendant in error to be further bound by the contract (Pr. Tr., pp. 96, 97 & 98), it was charged on the part of the defendant, and not denied by the plaintiff, that only about one-fifth of the product was being sold; that the remainder was being piled up in the warehouse, and that the defendant either had to cease operation at its factory or become insolvent if these conditions continued.

The written contract, which was signed by both parties, fixes the rights and obligations of the parties in this regard as follows: "It is further agreed that said party of the second part (plaintiff in error) shall control, handle and sell the entire output." (Pr. Tr., p. 11.)

The breach of this contract charged on the defendant in error is alleged to have occurred on the 1st day of December, 1899. On the 22d day of November, 1899, plaintiff in error by its letter (found at p. 97 of the Pr. Tr.) expressly repudiates the idea that any obligation rests upon it in regard to the sale of glue, and states that the meaning of the contract is simply that the plaintiff in error is to be the exclusive selling agent of the factory; that is to say, that this part of the contract is unilateral, and is for the benefit of the plaintiff in error, and that no corresponding obligation is assumed by it whatever.

The testimony on behalf of the plaintiff in error discloses the facts, which are emphasized by this correspondence, not only that it had not sold even a substantial part of the output of defendant's factory, but claimed that it was under no obligation to sell any of this product, and that it would proceed in this regard as the interests of plaintiff in error might dictate. Plaintiff in error declared in effect that if it chose so

to do, it might refrain from selling any of the product of defendant's factory, and require all of that output to be piled up to await the pleasure of plaintiff in error.

The terms of this agreement seem to bind plaintiff in error to sell the entire output of defendant's factory. Of course this must be construed reasonably and in accordance with customs of trade and conditions of the market, if any are shown. No such excuses are given in this case, but it does appear that plaintiff in error was forestalling the market with goods which it was manufacturing at and selling from its factory in Gowanda.

Whatever may have been the limit of obligation which this clause of the contract imposed upon the plaintiff in error, it clearly imposed some obligation; and when plaintiff in error repudiated any liability or obligation in the premises and at the same time failed or refused to sell more than one-fifth of the product in question, it certainly repudiated the contract on its part, and in addition substantially failed in performance.

Under the case of

Cresswell R. & C. Co. vs. Martindale, 27 U. S. App., 277,

this warranted the abandonment of the contract by the defendant in error, and amounted to a substantial breach on the part of the plaintiff in error which disabled it from maintaining an action against the other party for failure or refusal to perform.

Norrington vs. Wright, 115 U. S., 188.

It is perfectly apparent that one of the main considerations moving to the defendant in error for the contract in question was the agreement of the plaintiff in error to sell its product. Any interpretation of this contract which makes it give to the plaintiff in error the right to tie up all the product or the major part of the product of the factory without any corresponding obligation to sell on its part, is not only preposterous as matter of law, but is unconscionable as a matter of morals.

The contention of plaintiff in error in this regard was that it might use the product of this great factory simply for the purpose of affecting the market so that it (the plaintiff in error) might reap the profits of such manipulation by sales of goods produced by itself as a rival manufacturer.

We submit that the default of plaintiff in error and its declarations in this behalf, justified the action of defandant; and that the judgment should be affirmed on this ground, even if it stood alone.

The only breach alleged and the only cause of action presented is that on the second day of December, 1899, defendant "definitely stated to plaintiff that the said contract was at an end, and refused to be further bound thereby, or to allow the plaintiff to make further sales thereunder." (Pr. Tr. 26.)

For this breach the complaint alleges that "plaintiff has sustained damages in the sum of two hundred thousand dollars." (Pr. Tr., p. 27.)

Before the *ad damnum* clause, the complaint enumerates the classes of damages as follows:

Commissions already earned on sales.

Services in supervising construction of factory, etc.

Losses from closing down plaintiff's other establishments, and

Loss of profits which might have been made by performing the contract. (Pr. Tr., p. 26.)

This is not the case, therefore, suggested in

U. S. vs. Behan, 110 U. S., 338-345,

where plaintiff upon wrongful stoppage of the contract, elects to rescind it and recover on *quantum meruit*.

But plaintiff has elected "to go for damages for the breach of the contract," and must trace his right to damages through the contract and can recover nothing unless the stoppage of performance was wrongful. That is to say, all damages are in the same category, and all depend upon plaintiff's right to perform.

Roehn vs. Horst, 178 U. S., 1.

The contract is an entirety. The stipulation for planning and supervising the construction of a factory are preliminary only and call for no compensation. The term of the contract, five years, does not begin until the factory is in operation, at which time begins the main portion of the contract, viz.: the operation of the factory and sale of its products.

No compensation is considered except as it is to be derived from the last step,—sales of product,—and is measured by commissions thereon.

If, as the Court below held, the continued performance of the contract was illegal, as constituting transaction of business within the State of Wisconsin, the inference which that Court draws is irresistible, viz:—"that refusal by defendant to carry on the transactions in deliberate violation of the statute, constituted no actionable breach of the contract." (Opinion Judge Seaman, Pr. Tr., p. 32.)

This inference being sustained, it necessarily follows that no legal damages can ensue; and it is immaterial from what source the alleged damages arise, since there being no *injuria*, there can be no recovery.

If plaintiff had commenced an action to recover the commissions which it is alleged were earned, it would still fail, since its right to recovery must be traced through the illegal contract. Its action would then be to recover compensation for an *executed* portion of a contract forbidden by law, that is, for transacting business in Wisconsin; that is to say, in part, for operating the factory. This part, if it alone were illegal, would so infect the whole contract and the right of recovery, as to avoid the whole.

McMullen vs. Hoffman, 174 U. S., 639-654, et seq.
C., M. & St. P. Ry. vs. R. R., 61 Fed. Rep., 993.
Oliver vs. Gilmore, 52 Fed Rep., 562.

It would be inconsistent and illogical to say that plaintiff could not recover prospective damages for the reason that the breach was not actionable; and then to hold it entitled to damages already accrued from the same breach; or to hold

that plaintiff may prevail upon the portion of his contract which was legal by refusing to refer to the portion which was illegal.

McMullen vs. Hoffman, *supra*,
and cases cited page 656.

We submit therefore, that the verdict was properly directed by the Court below, and that the judgment should be affirmed:

1st. For the reason given in his opinion by the learned District Judge, that the provisions of the Wisconsin statute "took effect on September 1, 1898, and incapacitated the plaintiff to transact business thereafter in the state except on submission to the requirements of the statute. But performance became illegal without such compliance on the part of the plaintiff, and that refusal by the defendant to carry on the transactions in deliberate violation of the statute constituted no actionable breach of the contract." "It is sufficient that performance became illegal without fault or concurrence on the part of the defendant"; (Pr. Tr., p. 32.) and

2d. On the ground that the plaintiff in error proved its own disloyalty to the defendant in error, its principal, and proved its own substantial breach of the contract and so warranted the abrogation of the contract.

CHARLES QUARLES,
Of Counsel for Defendant in Error.

FILED

NOV 28 1900

In the Supreme Court of the United States.

OCTOBER TERM, 1900.

No. 119.

THE DIAMOND GLUE COMPANY,

Plaintiff in Error,

vs.

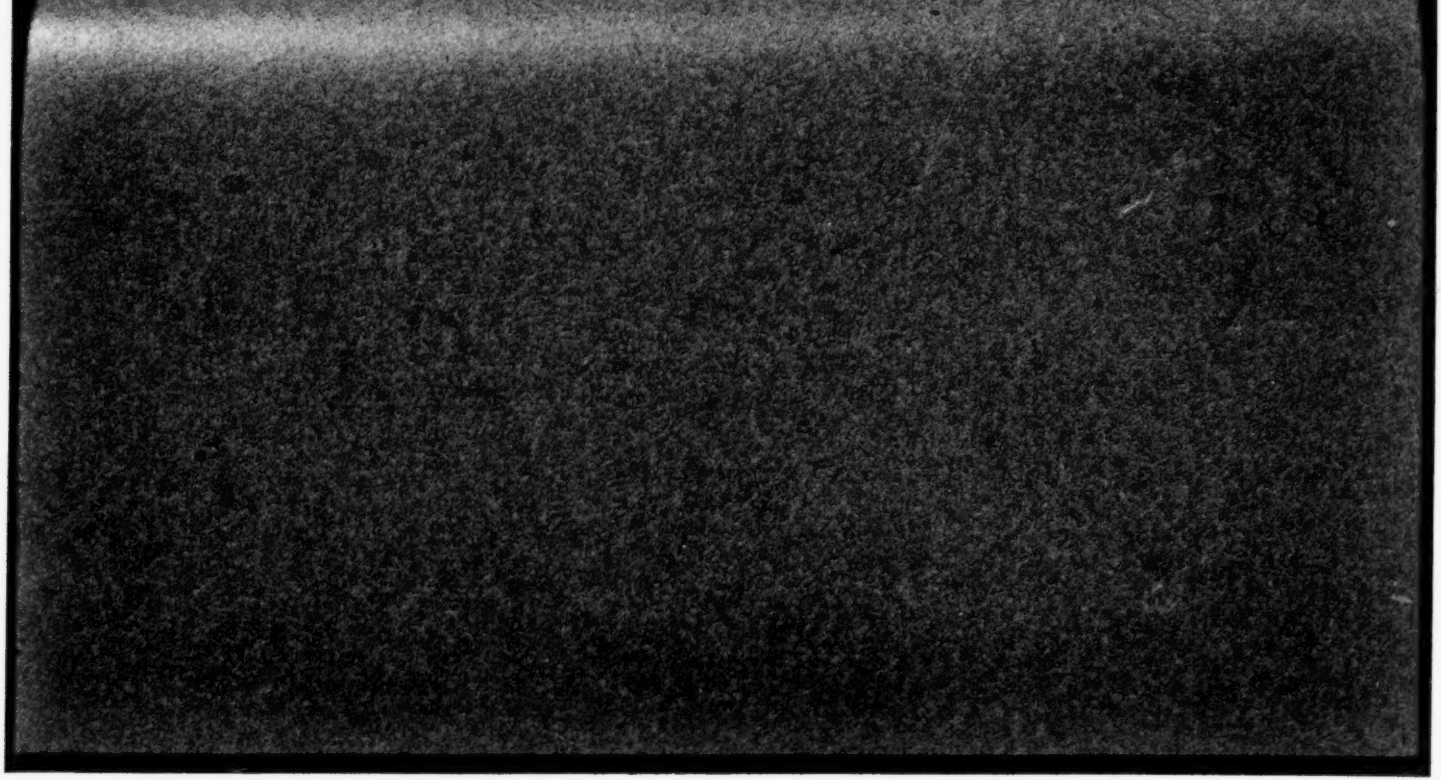
THE UNITED STATES GLUE COMPANY,

Defendant in Error.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF WISCONSIN.

GEORGE L. LOCKE,

Of Counsel for Defendant in Error.



SUPREME COURT OF THE UNITED STATES.

THE DIAMOND GLUE COMPANY,

Plaintiff in Error,

vs.

UNITED STATES GLUE COMPANY,

Defendant in Error.

BRIEF FOR DEFENDANT IN ERROR.

The counsel for the plaintiff in error contend in their brief, among other things, that although the contract in question required plaintiff to transact business within the state of Wisconsin, yet it did not in fact so transact business; that the statute of Wisconsin, which is relied upon by the defendant in error, not becoming operative until after the execution of the contract, the question whether this statute impaired the obligation of the contract is to be determined as though the statute were passed at the last named date; and that by practical construction of the contract it did not bind the plaintiff in error to transact business in Wisconsin, that is to say, to operate the factory of defendant in error and superintend the manufacture therein. It seems that neither of these positions is tenable for the reasons following.

Both the pleadings and the evidence show that plaintiff was transacting business in the State of Wisconsin under the contract.

In the contract sued upon are the following clauses: The party of the second part agrees:

"To advise with and plan with the architect of party of the first part, and to oversee and supervise the plans of said

factory and to secure such economy of space and processes as may be gained from the practical experience the party of the second part has had in the operating of three glue factories, and party of the second part further agrees to give party of the first part the benefit of all its labor-saving devices and the benefit of its knowledge and experience used or acquired by it in the manufacture of glue.

It is further agreed that party of the second part *shall have the management of the manufacturing in said factory and shall operate the same for party of the first part and furnish a superintendent, whose salary shall not exceed $150* per month, to party of the first part, and that party of the second part by its officers *shall give said factory such personal supervision as may be necessary from time to time in the operation of the same*, and said officers will give party of the first part, in the management and operation of said factory, the benefit at all times during the life of this contract, of the experience and knowledge of said officers and their company." (T., pp. 10 and 11.)

In its original complaint is found the following paragraph:

"Said plaintiff further alleges that upon the completion of said plant, it took the management of the manufacturing therein, *and operated the same* for said defendant, and furnished a capable superintendent therefor, whose salary did not exceed $150 per month, to be paid by said defendant, and did by its officers give said factory such personal supervision as was necessary from time to time in the operation of same, and by its officers did give to said defendant in the management and operation of said factory the benefit, at all times during the operation of said factory by it and until the breach of the contract herein mentioned, of the experience and knowledge possessed by said plaintiff and by its officers in respect to the management and operation of the same." (T., p. 5.)

Plaintiff's complaint was sworn to by Mr. Morron, its vice-president, and the officer who, as the testimony shows, chiefly conducted the negotiations for the contract and the business transacted with the defendant under it. It was sworn to on February 3, 1900, and filed February 5, 1900. It stood with the allegation above quoted in it until after the demurrer to that portion of the defendant's answer setting up the Wisconsin foreign corporation law had been overruled on May 8, 1900, and until July 7, 1900, when plaintiff filed an amended complaint changing the paragraph above quoted so as to al-

lege "that defendant assumed the management of the manufacturing therein and operated the same." (T., pp. 22 and 25.)

Not until the Circuit Court, in overruling plaintiff's demurrer to defendant's answer, had held that the transaction of business by plaintiff in the State of Wisconsin without compliance with the foreign corporation law of that State disabled the plaintiff from suing upon the contract, did plaintiff discover that it had not been operating the plant. Then, for the first time, the exigencies of the case made it plain to plaintiff that in truth and fact it had not managed and operated defendant's plant, and accordingly its complaint was amended.

With all the facts before it, plaintiff concluded on the 3d of February, 1900, and had supposed up to that time that it had managed and operated the factory. In June, 1900, when the amended complaint was sworn to, the facts being unchanged, a different conclusion was necessitated by the view taken by the Court of the Law, and the conclusion, which is itself a fact in the case, was changed accordingly.

While, by amendment, plaintiff may be relieved from an estoppel by the record which would otherwise exist by virtue of the allegation in the original complaint, still that allegation stands as an admission, to be considered with all other evidence in the case, upon the question whether plaintiff did in fact manage and operate defendant's factory.

But there are other allegations in both the original and amended complaint which amount to admissions that plaintiff transacted business in Wisconsin, and which, being in the amended complaint, should be held to estop it.

Thus, in both the original and amended complaint it is alleged:

"Said plaintiff has at all times been ready and willing to perform the terms and conditions of said contract, and has in all respects fully complied with the terms and conditions of the same to be performed on its part." (T. pp. 5 and 25.)

As the contract stipulated that plaintiff "shall have the management of the manufacturing in said factory, and shall operate the same for the party of the first part (T., p. 11,)"

the above allegation in the amended complaint cannot be true, unless plaintiff did have such management and did operate the factory.

Again, it is alleged in both original and amended complaints that the plaintiff furnished the superintendents and gave to the defendant in the management and operation of the factory the benefit of the experience and knowledge possessed by plaintiff and by its officers in respect thereto. (T., pp. 5 and 25.) The testimony, all of which came from plaintiff's witnesses, is in entire harmony with and supports these allegations in the complaint, asserting the transaction of business in Wisconsin.

Mr. Morron testified.

"The U. S. Glue Company were supposed to send regular printed sheets of the boilings and manufacturing work down to us at the end of every month or every week. The papers handed me are the accounts received from the U. S. Glue Company by the Diamond Glue Company of the manufacturing. They tell the kind of material that has been worked up, how much glue was used, how much labor, how much the sundries are, and what the yield of the glue stock is—that is, the number of pounds of glue stock. We would keep track to see how much the glue stock was yielding. The sheets show that they were sent weekly. That date says up here, 'manufacturing account for the week ending blank.' I think these are all that the Diamond Glue Company received from the U. S. Glue Company. The first one is for the week ending July 29, 1899, and the last one for the week ending November 4, 1899."

"Mr. Morehead was the first superintendent whom the Diamond Glue Company sent to the U. S. Glue Company. He had been superintendent of our plant at Madison, and had been general superintendent at our other plant. I think he remained superintendent of the U. S. Glue Company at Carrollville, or Milwaukee, until some time the latter part of August, 1899. We furnished another superintendent by the name of Harden. I guess he is there now. *Mr. Morehead is employed by the Diamond Glue Company as General Superintendent.*" (T., p. 47.)

"I think the U. S. Glue Company commenced accumulating glue stock from the 1st of January, 1899. I advised them to sell that glue stock when they said they were going to complete their factory by March 1st." (T., p. 51.)

That defendant wished to change the plans so as to reduce the cost of its plant, and in that connection says:

"I talked it over with Mr. Morehead, and we came to the conclusion that we could get along with less vats. We came to the conclusion by putting in about 300 vats there would be enough of a plant. The bids contemplate a little over 400." (T., p. 56.)

Mr. Freshman, secretary and treasurer of plaintiff testified:

"I am acquainted with what are called the manufacturing sheets put in evidence. I examined them as they came in. The Diamond Glue Company keeps sheets for this purpose. We showed Mr. Hansen how to keep these sheets when he came to Chicago. I talked with Mr. Hansen, and I think Mr. Vogel, about the way these sheets were filled in. (T., p. 57.)

"The Diamond Glue Company did not operate the factory at all. *It assisted in the operation.* I used to come to Milwaukee, and I used to talk over things with the superintendent—assisted in an off-hand way—used to go there twice or three times a week, and talk things over so as to help him along—see how things were going. I gave no directions in regard to running the factory. My understanding is that all the Diamond Glue Company did in regard to operating the factory was to assist and advise." (T., p. 58.)

"The Diamond Glue Company furnished Morehead and Harden at two times as superintendent for the U. S. Glue Company. When I was up to the factory to help bring about a good product, the U. S. Glue Company did not ask me to do anything that I did not do that I know of. They asked no service to my knowledge that I failed or refused to render."

"Mr. Morehead is the originator of the machine that cut the glue. That machine was furnished the U. S. Glue Company by the Diamond Glue Company, in whose employ Mr. Morehead originated the machine." (T., p. 59.)

W. H. Morehead, the first superintendent furnished by defendant to plaintiff testified:

"Mr. Freshman came up frequently. I do not think any directions were given me in regard to the conduct of the manufacturing; *left entirely to use my own judgment* in the running of that plant so far as making the glue was concerned, and we would talk matters over in a general way." (T., p. 65.)

Fred Bassinger, cashier and bookeeper for plaintiff testified:

"I was sent by the Diamond Glue Company to render assistance to the U. S. Glue Company. I think it was the last of September, 1899; I went to their factory at the request of Mr. Freshman, who was there the day before. I saw Mr. Hansen's bookeeper. I made some little suggestions about changing his system so it would conform with our ideas of getting the reports of the shipments. I took up a lot of forms that were used in our business to give him an idea of what he should do in order to get proper results. I wanted to give him the benefit of our experience. I think he adopted all the suggestions I proposed to him as to the forms, etc., but he did not seem to like the idea of changing his books." (T., p. 69.)

This testimony from plaintiff's own witnesses shows that plaintiff, through its officers, was consulted and advised about the erection of the plant and changes of plans therefor; that it furnished the superintendents; that through its superintendents so furnished, it had general charge and control of the manufacturing operations; that plaintiff's officers visited the plant twice or three times a week, consulting with defendant's officers at Milwaukee, and with the superintendent at the factory about the conduct of the business; that plaintiff procured machinery for defendants; that plaintiff sent its bookkeeper to instruct defendant's bookkeeper in regard to the keeping of accounts and the making of reports, and, as Mr. Freshman says, plaintiff did everything required of it under the contract. That this testimony shows the transaction of business within the State of Wisconsin would seem to be beyond dispute.

In *Mutual Life Insurance Co. vs. Spratley*, 172 U. S. 602,

it was held that an insurance company which had withdrawa its agents from the State of Tennessee and ceased to write new insurance in said state, but which continued to receive payments of premiums upon policies previously written, was doing business in Tennessee within the meaning of the statute of that state providing for service of process upon foreign corporations, and that service upon an agent sent especially into the state to investigate a particular loss, was good. The Court said (p. 611.)

"It cannot be said with truth, as we think, that an insurance company does no business within a state unless it have agents therein who are continuously seeking new risks and it is continuing to issue new policies upon such risks. Having succeeded in taking risks in the state through a number of years, it cannot be said to cease doing business therein when it ceases to obtain or ask for new risks or to issue new policies, while at the same time its old policies continue in force and the premiums thereon are continuously paid by the policy holders to an agent residing in another state, and who was once the agent in the state where the policy holder resided. This action on the part of the company constitutes doing business within the state, so far as is necessary, within the meaning of the law upon this subject."

In *Cooper v. Ferguson*, 113 U. S. 727,

the court considered the clause in the constitution of Colorado which prohibited only "the carrying on of business" by a foreign corporation without compliance with the statute. The Wisconsin statute declares that

"No corporation shall *transact* business or acquire, hold or dispose of property in this state until such corporation shall have"

complied with the statute. It may well be contended that "transacting business" means no more than "doing any business" as the latter phrase, found in the Alabama Constitution, was construed in

Farrior v. N. E. Mortgage Security Co., 88 Ala. 275.

But such contention is not necessary in this case; since here is a series of continuous transactions, the carrying on of business under its broadest definition.

In *Commonwealth v. Standard Oil Co.*, 101 Pa. St. 119,

it was held that the holding of an interest in a partnership in Pennsylvania was a doing of business in that state by the Standard Oil Company, a corporation of Ohio, within the meaning of the tax laws of Pennsylvania.

In *Female Academy v. Sullivan*, 116, Ill., 375.

the court said (p. 384):

"Receiving lands in this state by devise, and the assertion in the state of ownership over them, we regard a sufficient doing of business in this state to bring appellant within the purview of this language of the section."

The section referred to was Section 26 of the Illinois corporation law, which provides:

"Foreign corporations, and the officers and agents thereof, doing business in this state shall be subject to all the liabilities, restrictions and duties that are or may be imposed upon corporations of like character organized under the general laws of this state, and shall have no other or greater powers."

The case last quoted from was cited and approved in Pa. Co. for Ins. on Lives v. Bauerle, 143 Ill., 459-471.

In *Farmers' Loan and Trust Co. v. The Lake Street Elevated Co.*, 173, Ill., 439,

it was held that the Loan & Trust Company, a non-resident corporation, could not without compliance with the Illinois corporation law act as trustee under a mortgage to secure bonds issued by the Elevated Railway Company, an Illinois corporation, which trust deed authorized the trustee to certify the bonds and superintend their sale, to examine, by its agents, the books of the Illinois corporation and make reports to the trustee, and advise in controversies between the trusteee and the mortgagor. The trust deed in that case provided that the agent so appointed should be paid by the mortgagor. The Court said (p. 456):

"In the present case the trustees under the deed of trust executed by the Lake Street Elevated Railway Company certified and delivered 7,574 bonds of $1,000 each. From time to time in 1894 and 1895, the appellant rendered and mailed to the railway company bills for certifying bonds and accepting the trust deed, and for receiving subscriptions, etc., which bills were received and paid by the railroad company. The trustees exercised constant supervision over the application of the bonds as issued, correspondence was carried on between the railroad company and the appellant in reference to the issuance and delivery of the bonds and in regard to releases and accounts. On August 7, 1894, the appellant appointed an agent under the trust deed who did a large amount of business in behalf of the appellant in Chicago as such agent. This appointment was ratified and accepted by the railroad company by resolution of its board of directors. The agent accepted the agency, and frequently examined the books of the mortgagor and looked after the issuance and application of the several lots of authorized bonds; he made reports, as agent to the appellant, and to the American Trust & Savings Bank. He gave advice in reference to the questions in dispute which arose between the appellant and the railroad company from time to time. From these and other facts

appearing in the record which it is not necessary here to specify, it is manifest that the appellant was doing business in the State of Illinois within the meaning of said Section 26."

The management and operation of the plant formed the main feature of the contract, and was the main service for which compensation was to be paid to the plaintiff. The contract is plain, clear and unambiguous, and there is no room for construction.

The fifth contention of counsel for plaintiff in error is that, by practical construction, the parties have eliminated from this contract the very benefit which it was largely, if not chiefly, intended to secure to the defendant.

It is sufficient to say that since the contract is plain, unambiguous and in no way obscure, there is no room for construction, practical or otherwise.

Chicago v. Sheldon, 9 Wall., 50-54.

This contention, if available, should have been, that there was a modification of the contract, by which plaintiff was relieved from performing this service. Plaintiff dare not rely upon such contention, because such modification, if made, must have been after the 1st of September, 1898, and would have resulted in practically a new contract, entirely departing in substance from the original agreement, and one which would have been clearly subject to the Wisconsin statute in question; but particularly because the action is on the contract as written, and the breach relied upon is defendant's refusal to permit further performance of the contract as written; and the fact, if it existed, that up to the time of breach, defendant had not insisted upon performance of this particular stipulation would be immaterial. Under the pleadings plaintiff could not recover unless it had the right to fully perform.

But that such destructive construction of the contract was not made, and that such modification was never contemplated, is clearly apparent, not only from the complaint and original complaint, but from all the facts of the case.

In both the original and amended complaint, this paragraph occurs by way of inducement, and shows the considerations which moved the defendant to enter into this contract:

"Said plaintiff further alleges that prior to said 25th day of June, 1898, it had had large experience in the construction and operation of factories for the manufacture of glue and in the supervision and management of the same, and that its officers then possessed knowledge and experience in the construction and management of such factories and in the sale and disposition of their products and of all the raw material which is sold to or used by companies engaged in the manufacture or selling of glue or any of its bi-products, and that it possessed large facilities for selling and disposing of the same; all of which was at said times well known to said defendant, its officers, agents and stockholders." (T., pp. 3-23.)

It further appears, by allegations present in both complaints, that the stockholders and organizers of the defendant were tanners, with no experience in the directions mentioned. (T., pp. 3-23.)

It appears further from both complaints and from the contract itself, that the consideration for which defendant stipulated was the advantage of the experience and technical skill and knowledge of the plaintiff and its officers, and that the compensation for all of these considerations was to be simply measured by commissions on sales. The sale of the product was but one, and not necessarily the greater one, of the considerations, although it was used as affording a measure of compensation.

That this vital consideration should have been construed out of the contract is incredible. The idea of any such construction never occurred to the plaintiff or any of its officers, until the necessity for such construction was suggested by the decision of Judge Seaman on the demurrer. That such construction is an after-thought and never existed in fact, clearly appears from the oath of the executive officer of the plaintiff to the original complaint, and as clearly appears from the plaintiff's own testimony in the case, as cited above.

Sec. 1770b Wisconsin Statutes of 1898 is not unconstitutional as respects the contract in suit, for the reason that it was passed before the contract was entered into.

Only laws passed after a contract has come into existence can be obnoxious to Sec. 10 of Art. 1 of the U. S. Constitution, which declares that no state shall *pass* any law impairing the obligation of contracts.

In *Edwards v. Kearzey*, 96 U. S., 595-603.

this court said:

"The inhibition of the constitution is fully prospective. The states may legislate as to contracts thereafter made as they may see fit. It is only those in existence *when the hostile law is passed* that are protected from its effect."

In *Denny v. Bennett*, 128 U. S., 489-494,

speaking of the contention that a Minnesota Statute impaired the obligation of contracts, this Court said:

"So far as an attempt might be made to apply this statute to contracts in existence *before it was enacted*, it would be liable to the objection raised, and therefore, in such a case, of no effect, but the idea has long been settled that statutes *which are in existence* at the time the contracts are made are not void."

In 2 Rapalje & Lawrence's Law Dictionary, 935,

we find this definition of the word "passed" as used with reference to the passage of a statute:

"When a legislative bill is finally assented to by a majority vote of the body having its enactment in consideration, it is said to be "passed" by such body, and when also passed by the other house and approved by the executive, such bill becomes a statute."

In Anderson's Law Dictionary, 754,

the word "passed" is defined:

"To receive approval, as for a bill, an act, a law to pass one or both houses of legislation and be signed by the executive.

"An act of a legislature is "passed" when it has gone through the forms necessary by the constitution to give it validity as a binding rule of conduct; its passage dates from the time when it ceases to be a mere proposition or bill and passes into a law."

In *Johnson v. Fay*, 16 Gray, 144-5,

the Supreme Court of Massachusetts, speaking of an act of the legislature, says:

"The plaintiff does not come within the exception contained in the confirming clause, because he did not acquire his title prior to the passage of the act, by which we understand, the time when it had passed through the various stages rendered necessary by the provisions of the constitution to make it a valid statute and been approved and signed by the governor."

In *Commonwealth v. Bennett*, 108 Mass., 30,

the defendant was prosecuted under a statute of 1869 for selling liquor on July 4, 1870. A statute had been passed and appproved by the governor June 22, 1870, but not to take effect until July 22, 1870, which repealed the statute of 1869. The statute of 1870 contained a clause saving "any penalty or forfeiture already incurred under the provisions of any law in force prior to the passage of this act." The court said: (p. 32):

"If the saving clause had included only penalties or forfeitures incurred before the passage of this act, it would not have applied to the defendant's case," citing *Johnson v. Fay*, 16 Gray, 144.

In *Baker v. Johnson*, 2 Robertson, N. Y., 570-579,

the Court speaks of an act of Congress approved July 1, 1872, as

> "the tax law then in existence and which by its terms was to go into effect on the 1st of August,"

and held that the fact of taking effect of the law was postponed by the secretary of the treasury, as provided might be done in the act, did not excuse the performance of a contract entered into upon the supposition that the act would take effect on August 1st, thus holding that the parties were bound to take notice of the provisions of the act.

In *Smith v. Morrison*, 22 Pick., 430,

a question arose as to the validity and operation of a section in the revised statutes of Massachusetts, which were enacted November 4, 1835, but did not go into effect until May 1, 1836. The section in question limited the time for the commencement of actions upon judgments of Justices of the Peace to six years from the rendition of such judgment. It was claimed that inasmuch as the statutes did not go into effect until May 1, 1836, the section in question, if construed as applicable to

judgments rendered more than six years prior to that date, would be unconstitutional as impairing the obligation of contracts. The court said (p. 432):

"The answer to this objection is, that the Revised Statutes were passed on the 4th of November, 1835, and no action, commenced before the 1st of May following would be barred by the statute, which is limited to actions commenced after that time, when the Revised Statutes took effect. Whether the time allowed for creditors to commence their actions was a reasonable time or not, was a question within the exclusive province of the legislature to determine."

Thus it was explicitly declared that the statutes were *passed* November 4, 1835, and impliedly held that persons who might be affected by the limitation contained therein, which would become effective May 1, 1836, were bound to take notice of the passage of the statutes, and govern themselves accordingly.

And this latter proposition was directly held in *Stine v. Bennett*, 13 Minn., 138, where a precisely similar question was presented upon analogous facts, and the Court said (p. 143):

"This act upon its passage by the legislature and approval by the governor, had all the constitutional requisites of a law in our state. As a public law, therefore, although by its provisions not to take immediate effect, all persons were required, from its approval, or at least from its publication, to take notice of its existence and terms, and that at the time appointed its provisions would be operative for all purposes. This gave notice to all that a change in the law regulating the remedy upon the causes of action embraced in the act, would take place at the time appointed to determine its suspension, and that thereafter the remedy could be enforced only within six years from the time the cause of action accrued."

In *Logan v. State*, 3 Heisk., 442,

construing Sec. 20 of Art. 2 of the Tennessee Constitution, which provides that "no *law* of a general nature shall take effect until forty days after its passage unless" passed over the governor's veto. The Supreme Court of that state said:

"The meaning of this section is, that the law shall not take effect until forty days *after it has become a law; that is, after it shall have received the approval of the governor; or, upon his re-*

fusal to approve, shall have been otherwise passed under the provisions of the constitution."

To the same effect are:

Hill v. State, 5 Lea, 725.
In re Keney's estate, 56 Hun., 117.
Jones v. Hutchinson, 43 Ala., 721.
Chumasero v. Potts, 2 Mont., 242.
Wartman v. Philadelphia, 33 Pa. St. 202.

Through all the decisions runs the distinction between the passage or enactment of a law and its taking effect; and it is uniformly held that the passage or enactment of a statute means the completion of the formalities required by the fundamental law, and has no relation to the time when the statute may become operative, except in those few cases where the statute itself provides a different rule of interpretation or the context shows that the word "passage" or other similar word was intended to mean the time of taking effect. Such a case was

Charless v. Lamberson, 1 Ia., 435,

cited and relied upon in the brief for plaintiff in error. In that case the Court had under consideration a provision of the code of Iowa exempting the homestead of a debtor, but providing that it might "be sold on execution for debts contracted prior to the passage of this law or prior to the purchase of such homestead." The Constitution of Iowa provided that "no law of a public nature shall take effect until the same shall be published and circulated in the several counties of this state, by authority." A section of the code declared that the terms "hereafter" and "heretofore," as used in the code, have relation to the time when this statute takes effect; the Court held that the words "prior to the passage" as used in the homestead exemption section, amounted to the same thing as if the legislature had used the word "heretofore," and therefore must relate to the time of taking effect, and not to the time of passage. Its conclusion was based on the ground that as the constitution prohibited laws from taking effect until publication, rights could not grow up under

such a law before it was published. It will be observed that the Court recognizes (p. 443) the distinction here contended for between the passage and taking effect of a law.

In addition to some provisions, not material here, respecting the passage of laws, the Constitution of the State of Wisconsin, in Sec. 10 of Art. 5, provides:

"Every bill which shall have passed the legislature shall, before it becomes a law, be presented to the governor; if he approve, he shall sign it, but if not, he shall return it, with his objections, to that house in which it shall have originated, who shall enter the objections at large upon the journal and proceed to reconsider it. If, after such reconsideration, two-thirds of the members present shall agree to pass the bill, it shall be sent, together with the objections, to the other house, by which it shall likewise be reconsidered, and if approved by two-thirds of the members present it shall become a law. But in all such cases the votes of both houses shall be determined by yeas and nays, and the names of the members voting for or against the bill shall be entered upon the journal of each house respectively. If any bill shall not be returned by the governor within three days (Sundays excepted) after it shall have been presented to him, the same shall be a law unless the legislature shall, by their adjournment, prevent its return, in which case it shall not be a law."

And, in Sec. 21 of Art. 7, it is provided:

"The legislature shall provide by law for the speedy publication of all statute laws, and of such judicial decisions, made within the state, as may be deemed expedient. And no general law shall be in force until published."

Sec. 10 of Art. 5 above quoted contains the only requirements necessary to be complied with in the making of a law in Wisconsin, and when the formalities therein directed have been gone through with, the law is complete in every respect, although it may never become operative, for want of publication, under Sec. 21 of Art. 7 above quoted.

As has been shown in the other brief, the statutes of 1898 were passed by the legislature and approved by the governor in August 1897. They were published and certified by the judges of the Supreme Court, as provided in the revision itself, in May, 1898, six weeks before the contract in suit was entered into. Under all of the authorities, Sec. 1770b, was, on the 25th day of June, 1898, when this contract was executed,

a law of the State of Wisconsin, of which every person was bound to take notice, and which entered into the contract between the parties to this action, and therefore could not impair its obligation.

Sec. 21 of Art. 7 of the Wisconsin Constitution above quoted, declares that "no general law shall be in force until published." The constitutions of many other states contain similar provisions, some of them postponing the taking effect of a law for a specified number of days after its passage or after its publication. It is also frequently provided in statutes that they shall not take effect for a certain time after passage, or after publication, or until a specified day. Such was the case with the Wisconsin statutes of 1898, which though enacted in August 1897, provided that they should not be in force until September 1, 1898. The object of all these provisions, it has been uniformly held, is to allow the people to become familiar with the impending changes in the statute law. The accomplishment of this object necessarily implies that the people to be affected by the law are bound to take notice of its terms before the time arrives at which it is to go into effect. The whole purpose and object of postponing the taking effect of a law is inconsistent with the idea that during the time intervening between its passage and the date fixed for it to take effect, the public are not chargeable with knowledge of it, or, having knowledge of it, are at liberty, by contract or otherwise, to evade its provisions. The period of suspense is provided in order that the citizen may so adjust his affairs as to comply with the law when it becomes operative; not that he may enter into contract obligations, purely executory, the performance of which will be in violation of the law. And the provision in the Constitution of the United States relied upon by plaintiff in error was never intended to enable parties, by contract, to put themselves in a position to defy a law which had passed through all the constitutional stages, and had been duly published prior to the making of such contract, but which, under constitutional or statutory provisions, designed solely to enable parties affected to ad-

just their affairs in harmony with the new law, was to take effect after the date of the contract.

Again, the clause of the federal constitution relied upon is in restriction of the power of the states, and this restriction goes no further than its words carry it.

But it is not necessary to resort to any rule demanding strict construction:

For the reason that the inhibition is directed against action by the legislature of a state, against legislation, that is, the making or enactment of laws. A statute may not be operative until it is published; but it does not follow that the printer aids in the enactment or is part of the lawmaking power.

Mead v. Bagnall, 15 Wis., 156-161.

So a law may not be operative until after the lapse of a prescribed period. It cannot be said that time contributes to the passage of the law, or in any way aids in its enactment. Therefore, the question whether a given statute is constitutional or not, is to be determined at the instant of its passage. If, at the time of the completion of the legislative act, no contract existed whose obligation is impaired, the constitutional provision has not been violated.

It would be remarkable indeed, if the completed act of a legislature could be rendered unconstitutional by a subsequent act of citizens. It is a contradiction in terms to say, that at the time its action was completed, the legislature had not violated this direction of the federal constitution, but that by the subsequent act of private citizens or foreign corporations this act of the legislature, constitutional when taken, came to violate the federal constitution.

It would seem too clear for argument that since this prohibition of the constitution is directed to the legislative body, and prohibits certain action by it, the complexion of its acts cannot be determined by circumstances to occur long after this action was complete and the legislature had dissolved and become a thing of the past.

Plaintiff could not by contract acquire any vested right to do business in Wisconsin.

Counsel's fifth proposition is that the plaintiff acquired a vested right under this contract because it was made in the interim between the passage of the act and the time it became operative.

This contention, of course, proceeds upon the assumption (unwarranted as we claim) that the contract at the time it was made, was not subject to the prospective operation of the law, and that plaintiff acquired such a vested right in the subject of the contract as could not be impaired within the rule of

Fletcher v. Peck, 6 Cranch, 87-138.

The difficulty is that the subject of the contract in question is not property or the acquisition of property, but the rendition of services in a foreign territory.

This contention, plainly stated, means that the plaintiff, by making, in June, 1898, an agreement purely executory, acquired a vested right to transact business in Wisconsin for a term of years, although by the contract no right in property or to acquire property passed; and counsel should have cited:

Bedford v. Eastern B. & L. Asso., 181 U. S., 227.

where this Court has shown the limit to which this contention can go.

In that case, this Court held that by the contract made by the loan association before the passage of the law prohibiting it from carrying on business in Tennessee, it had obligated itself to make the loan under consideration, as an incident to the reception of the borrower as a member of the corporation, and that this obligation could not be wiped out by any act of the Tennessee legislature subsequent in point of time.

It is apparent that the case is not parallel, since there was the completion of a single transaction which the corporation had obligated itself to perform. Here, the obligation, if any exists, is to transact business in the State of Wisconsin for a term of years.

The cases would have been more nearly parallel if, in that case, the building association had, before the passage of the act, contracted with an agent in Tennessee to represent it in that state in soliciting subscriptions to the stock of the association for the term of twenty years, for compensation to be measured by commissions upon the subscriptions secured.

The question then would have arisen there, as here, whether a state could be deprived of power to exclude a foreign corporation from the transaction of continuous business within its borders, by the executory contract of such corporation with a private citizen.

It would be a singular conclusion that the Federal Constitution enables tramp corporations to neutralize state legislation regulating their action, and enables them to domesticate themselves in any state against the will of the sovereign.

If such a conclusion were to be announced by this Court the legislature of all the states would, within a very short period, be paralyzed by executory contracts of agency and the like. Such an announcement from this Court would enable a New Jersey Corporation to forestall all hostile legislation in Wisconsin or Illinois, by making an executory contract of agency for a term of fifty years. This, of course, is absurdity.

It is submitted therefore, that since the only breach charged is refusal by defendant to permit plaintiff to continue to transact business within the State of Wisconsin; since such transaction of business was forbidden; and since plaintiff had no right to perform save such as it arrogated to itself by virtue of its own promise to do the forbidden acts; since plaintiff's presence in Wisconsin at any time was permissive only; and since plaintiff had notice at the time of the execution of the contract that performance was forbidden, it has no right of action and the judgment of the Court below should be affirmed.

GEORGE LINES,
Of Counsel for Defendant in Error.

Supreme Court of the United States.

No. 119.—October Term, 1902.

The Diamond Glue Company, Plaintiff in Error, *vs.* The United States Glue Company.	In error to the Circuit Court of the United States for the Eastern District of Wisconsin.

[January 5, 1903.]

Mr. Justice Holmes delivered the opinion of the Court.

This is an action upon a written contract alleging a breach and claiming damages. It was brought in the United States Circuit Court for the Eastern District of Wisconsin by an Illinois corporation against a Wisconsin corporation. On June 25, 1898, the date when the contract was made, a law had been enacted in Wisconsin, to go into operation later, on September 1, 1898, requiring corporations incorporated elsewhere to file a copy of their charter with the Secretary of State, and to pay a small fee as a condition of doing business there. Wis. St. 1898, §§ 1770*b*, 4978. This it was admitted that the plaintiff had not done, and the defendant set up that the contract was a contract to do business in Wisconsin after the statute took effect, and that the defendant was justified by the statute in declining to go on. The judge sustained this defense, and the plaintiff excepted, contending that the statute did not and could not constitutionally affect its rights under the contract in question. It brings the case here by a writ of error.

The contract was one by which it was agreed that the plaintiff should supervise the plans for a glue factory to be built by the defendant on a site to be selected within sixty days; that it should have the management of the manufacturing in the same and should operate it for the defendant; that its officers should give the factory such personal supervision as might be necessary, and give the defendant in the management and operation of the factory the benefit of their experience and of the plaintiff's; that the plaintiff should furnish and keep the defendant supplied with a superintendent; that it should control, handle and sell the entire output of the factory; that it should refrain from manufacturing hide or calf glues at any of its own factories; and that it should guarantee payment on all sales made by it and should receive certain commissions for its services. The contract was to run for five years from the time that the plant was finished and began work. It was understood that the proposed factory

was to be in Wisconsin. A site was selected near Milwaukee, and in a little over a year from the date of the contract, on July 25 or 26, 1899, the plant was built and put in operation.

The section of the Wisconsin statutes relied on by the defendant, stated more at length, forbade corporations organized otherwise than under the laws of that State to transact business in the State until they should have filed a copy of their charter with the Secretary of State, which act, by the same statute, constituted the Secretary of State the attorney of the corporation for the service of process. A failure to comply with any of the provisions of the section subjected the corporation to a fine. It was provided further that every contract made by such corporation affecting the personal liability thereof or relating to property within the State before compliance with the section should be wholly void on its behalf, but should be enforceable against it. A fee of twenty-five dollars was to be paid for filing the charter. See *Ashland Lumber Company* v. *Detroit Salt Co.*, 89 N. W. R. 904.

According to the undisputed testimony of the plaintiff's vice president, who executed the contract, the instrument was signed in Wisconsin, and at all events, if it was executed with a view to the carrying on of business in that State by the plaintiff, the law of Wisconsin must be applied. *London Assurance* v. *Companhia de Moagens do Barreiro*, 167 U. S. 149, 160, 161; *Graves* v. *Johnson*, 156 Mass. 211. There is no controversy on this point. But it is said that the contract did not contemplate the carrying on of business by the plaintiff in Wisconsin, that at most it is ambiguous, and that practically it was construed in accordance with the plaintiff's contention. The declaration is on the contract, and by that the plaintiff must stand or fall. We see no ambiguity in its terms. The plaintiff was to have the management of the manufacturing, was to operate the factory, or at least to assist in operating it, and to keep it supplied with a superintendent. It did assist in operating by its officers and did supply a superintendent, and whether in his superintendence he in fact acted as agent for the plaintiff or the defendant, what the contract required is plain. It called for a carrying on of business in Wisconsin by the plaintiff at a time when to carry it on without filing a copy of the plaintiff's charter was forbidden by the laws of the State. See *Mutual Life Insurance Co.* v. *Spratley*, 172 U. S. 602, 611. The only complaint of the plaintiff is that the defendant refused to perform that contract when the plaintiff had filed no copy of its charter and when the performance was forbidden by the law. It is said, to be sure, that the part refused by the defendant was a different and lawful portion. But the contract was an entire contract, as both parties agree, and therefore whatever the defendant had in mind, if it was justified by the law, in refusing to perform a material part, it was justified in refusing to perform any portion. See *McMullen* v. *Hoffman*, 174 U. S.

639. It is alleged to have declared the contract at an end. We may add that it is not a question of election but of the legality of performance, and therefore the justification could not be waived.

It hardly could be contended that the contract was illegal, on the ground just stated, when it was made. If indeed it had contemplated the plaintiff's going on without complying with the statute, it would have raised a question which we need not discuss. But it must be taken to have contemplated legal action, and if filing a copy of its charter was a condition precedent of the plaintiff's right to carry out its undertakings, then a promise might be implied on its part to take the necessary steps. But if, when the time came, the plaintiff did not take those steps, the defendant had the legal right to refuse to go on, whether its right be put on the ground of the plaintiff's breach of its implied undertaking or of the illegality of the proposed continuance of the work. The plaintiff contends, however, as we have said, that the statute did not and could not apply to the performance of the contract in suit. It will be remembered that while enacted before the contract was made, it did not go into effect until afterwards, although before the time when the factory was or could have been built in the ordinary course of business. It is said that if the statute is taken to govern the present contract it impairs the obligation of that contract, and encounters the United States Constitution, art. I, section 10. It is assumed that to allow the statute any operation upon the contract is to give it a retroactive effect, and it is said that for that reason also plaintiff is not barred.

A prohibition of the doing of business after a statute goes into effect is not retroactive with regard to that business, even though the business be done in pursuance of an earlier contract. The suggestion needing discussion is whether the statute impairs the obligation of the contract. We are of opinion that it is not open to that objection. We leave on one side the question how the obligation of a contract can be impaired by a law enacted before the contract was made. *Pinney* v. *Nelson*, 183 U. S. 144, 147. Again, we need not consider in its full breadth whether or how far, notwithstanding *Security Savings & Loan Association* v. *Elbert*, 153 Indiana, 198, a corporation, by making a contract reaching years into the future, can exonerate itself from all police or license laws, on the ground that by indirection they make performance of the contract more difficult to an infinitesimal degree. Compare *Curtis* v. *Whitney*, 13 Wall. 68, 71; *Bedford* v. *Eastern Building & Loan Association*, 181 U. S. 227, 241. We shall advert to parallel considerations in connection with the alleged interference with commerce between the States. The prohibition in this case is not absolute but is only conditional on the failure to deposit a copy of the plaintiff's charter and to pay a small fee. It is merely incident to a regulation which, but for the contract, unquestionably would be proper, and which is familiar in the laws of the States. It can

be avoided by compliance with the regulation. We are not prepared to say that the regulation would be unreasonable or invalid as to such a contract as this, even if enacted after the contract was made. But we rest our decision upon the narrower ground of the foregoing considerations taken in connection with what we are about to say.

The suspension clause of § 4978 was of immediate operation, and therefore was notice to the plaintiff and defendant of itself and of what was suspended and for how long. If with that notice they contracted for the transaction of business within the jurisdiction of the statute and after the statute should have gone into effect, they did so with notice that, if nothing changed, the contemplated business would be unlawful by force merely of present conditions and the lapse of time, unless the plaintiff should comply with the regulation. In such circumstances, at least, it seems to us impossible to say that the obligation of the contract is impaired within the meaning of the constitution by the Wisconsin law. Statements made with a different intent in some decisions, to the effect that suspended statutes are to be read as if passed on the day when they go into operation, do not apply to a case like this. Such statutes are to be read in that way for the purposes of the operation which is suspended, but not for all. *Stine* v. *Bennett*, 13 Minn. 153, 157; *Smith* v. *Morrison*, 22 Pick. 430, 432; *Ford* v. *Chicago Milk Shippers' Association*, 155 Ill. 166, 181.

It is said that the contract in suit, as carried out, was concerned in part with interstate commerce, and therefore was free from the operation of the Wisconsin statute. The portion of the contract that called for the carrying on of business in Wisconsin was not so concerned, and the inseparable provisions as to selling left it to chance or extrinsic business considerations whether the contemplated traffic should go outside the State or not. The foundation of the commerce outside the State was doing business within it. The superintendence and manufacture had to come before the sale. The small requirements of this act before allowing the plaintiff to do business in the State, if good as to that business taken by itself, are not made bad by the presence in the contract of an ulterior term which the plaintiff might or did intend to carry out by transporting the products of the business elsewhere. *United States* v. *E. C. Knight Co.*, 156 U. S. 1, 13; *Hopkins* v. *United States*, 171 U. S. 578, 592, 594. The interference with the regulation of commerce between the States is more remote than when a bridge between two States, or the franchise of a domestic corporation created with the intent to carry on such commerce, is taxed. See *Henderson Bridge Co.* v. *Henderson City*, 173 U. S. 592, 622, 623; *Central Pacific Railroad Co.* v. *California*, 162 U. S. 91, 119, 125, 126. In modern societies every part is related so organically to every other, that what affects any portion must be felt more or less by all the rest. Therefore, unless everything is to be forbidden and legislation is to come to a stop, it is not

enough to show that, in the working of a statute, there is some tendency logically discernible, to interfere with commerce or existing contracts. Practical lines have to be drawn and distinctions of degree must be made. See further *Kidd* v. *Pearson*, 128 U. S. 1, 21; *Coe* v. *Errol*, 116 U. S. 517, 525, 527; *Tredway* v. *Riley*, 32 Neb. 695.

Yet another objection to the statute remains to be mentioned. At the date of the contract the section applied to partnerships as well as to corporations. It is argued that the act, so far as it applied to the former, was contrary to art. 2, section 4, of the Constitution of the United States, and to the Fourteenth Amendment, and therefore was invalid throughout. We shall not consider the validity of the law as applied to unincorporated associations, because, in our opinion, the application of the provision to corporations was severable from and independent of its application to partnerships, so that even if in the latter aspect the section was bad, it remained unaffected and valid so far as this case is concerned. The independence seems to us obvious on reading the statute, and is emphasized by the fact that the next year after the enactment, before the completion of the factory, partnerships were struck out of the act. St. 1899, c. 351, § 27. We are of opinion that the ruling of the Circuit Court was right, and that the judgment should be affirmed.

Judgment affirmed.

True copy.

Test:

Clerk Supreme Court, U. S.